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No. _____

In The

Supreme Court of the United States

October Term, 1984

HUGHES-BECHTOL, INCORPORATED,

Petitioner,

vs.

WEST VIRGINIA BOARD OF REGENTS,
A Statutory Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts below erred by failing to identify Hughes-Bechtol's contract rights as property protected against deprivation by the states or by one acting under color of state law under the Fifth and Fourteenth Amendments and, by dismissing the suit, effectively denying Hughes-Bechtol constitutionally guaranteed due process of law.

2. Whether the courts below erred in failing to recognize that dismissal of Hughes-Bechtol's breach of contract action and relegation of Hughes-Bechtol to the West Virginia Court of Claims as its exclusive remedy, which is legislative and discretionary in nature, is contrary to the judicial remedy required under the Due Process Clause of the Fifth and Fourteenth Amendments.

3. Whether there exists an identifiable need for the Supreme Court to develop

a national uniform standard for determining when a state agency will be deemed to be a citizen for diversity-of-citizenship jurisdiction purposes under 28 U.S.C. §1332.

4. Whether the Supreme Court should review and reassess present case law regarding the mandatory provisions of the Federal Arbitration Act and determine whether the Act should be found to provide an independent basis for federal court jurisdiction in light of today's methods of financing and constructing state educational institutions.

5. Whether the Board has deprived Hughes-Bechtol of its contract property rights by entering into a construction contract, receiving the benefit of the contract and then denying the obligations of the contract in violation of Hughes-Bechtol's civil rights under 42 U.S.C. §1983.

6. Whether the extreme inequitable nature of this case requires that this Court exercise its supreme judicial power to right obvious wrongs.

PARTIES IN COURT BELOW

Petitioner is Hughes-Bechtol, Incorporated, an Ohio corporation engaged in the construction business.

Respondent is the West Virginia Board of Regents, a statutory corporation which has ownership of state universities of West Virginia. The Board is affiliated with the State of West Virginia.

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OPINIONS BELOW

The opinion of the Court of Appeals, rendered on June 18, 1984, is reported at 737 F.2d 540 (6th Cir., Ohio 1984) and is reproduced in the Appendix at pages 168-185.

The opinion of the District Court of December 4, 1981 granting the Board of Regent's Motion to Dismiss is reported at 527 F. Supp. 1366 (D.C. S.D. Ohio, W. Div., 1981), and is reproduced in the Appendix at pages 67-167.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 18, 1984, and this petition for a writ of certiorari will be filed within 90 days of the entry of that judgment. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

(Pertinent text is set forth App. pp.1-66)

1. Federal Provisions
   (i) United States Constitution
      (a) Amendment V
      (b) Amendment XI
      (c) Amendment XIV
   (ii) United States Code
      (a) Declaratory Judgment Statute 28 U.S.C. §2201
      (b) Federal Question Jurisdiction Statute 28 U.S.C. §1331
      (c) Diversity of Citizenship Statute, 28 U.S.C. §1332
      (d) Civil Action For Deprivation of Rights Statute 42 U.S.C. §1983
      (e) United States Arbitration Act
         9 U.S.C. §1
         9 U.S.C. §2
         9 U.S.C. §4
         9 U.S.C. §9
2. West Virginia Provisions
   (i) West Virginia Constitution Article VI, §35
   (ii) West Virginia Code
      (a) §18-26-3
      (b) §18-12B-1 et seq.
      (c) §18-11E-1 et seq.

STATEMENT OF THE CASE

A. Factual History

Rather than raise capital funds for the remodeling, renovation and new construction of buildings at its Marshall University campus

through the exercise of its sovereign power to tax, the State of West Virginia opted for what has become the more popular method of raising capital, i.e., by authorizing, issuing and selling in interstate commerce non-recourse revenue bonds. On August 1, 1977, therefore, through the West Virginia Board of Regents, a corporation created by the West Virginia legislature, $51,700,000 of State System Tuition Fee revenue bonds, 1977 Series A, were issued.

> "The 1977 Series A Bonds will be issued in the form of coupon bonds, registrable as to principal only, in the denomination of $5,000. Principal and semi-annual interest (April 1 and October 1, first coupon April 1, 1978) payable at the office of the Treasurer of the State of West Virginia, Charleston, West Virginia, or at the option of the holder at the principal office of Citibank, N.A., New York, New York or at the principal office of First National Bank of Chicago, Chicago, Illinois.
>
> "The 1977 Series A Bonds are revenue bonds of the State of West Virginia payable solely from the Revenues pledged therefor and defined herein. The 1977 Series A Bonds shall not be

> deemed to be obligations or debts of the State of West Virginia and the credit or taxing power of the State of West Virginia shall not be pledged therefor." (Emphasis added)
>
> (From the Face Page of the Official Statement, App. p. 258).

Having the funds in hand, the West Virginia Board of Regents (the Respondent in this appeal, hereinafter referred to as the Board) proceeded to advertise in interstate commerce for contractors to perform the scheduled work at the Marshall University campus. Hughes-Bechtol, Inc., an Ohio corporation, and the Petitioner herein (hereinafter referred to as Hughes-Bechtol) responded to the advertisement, bid the mechanical work and was awarded a contract in the amount of THREE MILLION ONE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED SEVENTY-THREE AND NO/100 DOLLARS ($3,162,173). The contract, which was prepared by the Board, was a compilation of the American Institute of Architects "Standard Form of Agreement Between

Owner and Contractor" showing the Board (not the State of West Virginia) as the owner and Hughes-Bechtol as the contractor and containing the usual and ordinary clauses for dispute resolution by the American Arbitration Association. (App. p. 219). Although the Official Statement as noted above contained a disclaimer of responsibility by the State, the construction contract contained no disclaimer of any type and no notice that any sums awarded through the dispute resolution procedures of the contract would be payable solely as a moral obligation of the State of West Virginia, and then only after a de novo hearing before a "Court of Claims". Hughes-Bechtol notes also that the West Virginia Court of Claims is not judicial but rather legislative in nature and is merely an advisory arm of the Legislature created to review claims asserted against the State or its agencies for consideration by the West Virginia Legislature for payment as an act of

grace and a matter of moral obligation of the State. Relying upon the plain language of the "Standard Form of Agreement Between Owner and Contractor", Hughes-Bechtol proceeded with its work, suffered approximately ONE MILLION AND 00/100 DOLLARS ($1,000,000) of damages over and above the contract price as the result of the failure of the Board to perform its supervisory obligations under the construction contract. As a result of such damages, Hughes-Bechtol sought payment of such additional amounts and, when denied, turned to arbitration as bargained for in its contract.

Thus, on December 11, 1980, Hughes-Bechtol filed a demand for arbitration with the Cincinnati, Ohio office of the American Arbitration Association (AAA). The AAA, recognizing the significance and complexity of the dispute, appointed one of its most experienced panel members as arbitrator, Robert Bruce Shearer, a retired governmental contract expert, national

lecturer on construction contract disputes and a respected attorney.

Arbitrator Shearer bifurcated the arbitration inquiry with consideration being first given by him to whether the issue was one subject to arbitration. On February 20, 1981, the arbitrator ruled that the matter was arbitrable, and notified the parties of his decision. (App. p. 186). A substantive hearing on the claims of Hughes-Bechtol was held and lasted three (3) days. On June 9, 1981, the arbitrator after careful consideration, issued his decision, finding that Hughes-Bechtol was entitled to an additional sum of FIVE HUNDRED TWENTY-ONE THOUSAND THREE HUNDRED TWENTY-SIX AND 48/100 DOLLARS ($521,326.48). (App. p. 189).

While the Board did not participate directly in the arbitration hearings, it did have representatives present during a substantial part of the hearings. However, the Board and the West Virginia Attorney

General's Office advised Hughes-Bechtol and the American Arbitration Association that the Board was not authorized to engage in binding arbitration.

A second arbitration was held on February 28, 1983, and although the Board was properly notified, it refused to make an appearance and participate. The second arbitration concerned further additional costs incurred by Hughes-Bechtol beyond the cut off date of the first arbitration. A panel of three (3) newly appointed arbitrators awarded Hughes-Bechtol an additional THREE HUNDRED NINETY-EIGHT THOUSAND SIX HUNDRED EIGHTY-FIVE AND 85/100 DOLLARS ($398,685.85). (App. p. 194).

Neither award has been paid to date.

B. Procedural History

Hughes-Bechtol, in its District Court Complaint filed on February 9, 1981, alleged that the Board had entered into a construction contract with Hughes-Bechtol dated March 14, 1979 and sought relief on the grounds that the

Board had breached its contract by failing to honor the arbitration clauses which had been placed in the construction contract for the express purpose of resolving disputes when, and if, they arose. Federal jurisdiction was invoked under 28 U.S.C. §§1331(a), 1332 and 2201, and Rule 57 of the Federal Rules of Civil Procedure.

The Board, after being properly served with a copy of the Summons and Complaint, sought an extension of the answer date, and by stipulation, it was granted.

The Board then filed a Motion to Dismiss supported by a single affidavit on April 2, 1981 and urged dismissal of the case on the grounds that (1) the District Court lacked subject matter jurisdiction because the action was barred by the Eleventh Amendment to the United States Constitution, and Article VI, Section 35 of the West Virginia Constitution; (2) there was no diversity of citizenship jurisdiction, nor was there federal question

jurisdiction; (3) there was a lack of personal jurisdiction and insufficient service of process; (4) there was improper venue; (5) there was failure to state a claim; and (6) there was failure to join an indispensible party, the State of West Virginia.

Between the filing of the Board's Motion on April 2, 1981 and the District Court's written decision on the merits, issued on December 4, 1981, Hughes-Bechtol sought to avail itself of a remedy provided in its Standard Form Contract. Specifically, under Article 9.7.1 of the contract (App. p. 251), Hughes-Bechtol could cease work after written notice to the owner until such time as an unpaid arbitration award is paid by a recalcitrant Owner. When the Board both continued to refuse to pay the award and also threatened to reassign Hughes-Bechtol's work to another contractor, Hughes-Bechtol sought injunctive relief to prevent such reassignment. A hearing on the injunction

took place on August 11, 1981 and the injunction was verbally denied by the District Court in telephone conference within days after the hearing.

Hughes-Bechtol also formally requested the right to conduct discovery regarding its case in chief but was denied permission to do so and therefore never was afforded discovery in the case in chief.

On December 4, 1981, the District Court filed its written Decision and Entry confirming its verbal ruling denying an injunction, and rendered a final decision on the Board's Motion to Dismiss. The Board's Motion to Dismiss was granted "because this Court does not have jurisdiction over the subject matter of the present action." (Decision and Entry, App. p. 149). Hughes-Bechtol's motions seeking orders of the Court to compel discovery and expressing a disinclination to sustain Defendant's motion to dismiss, which had been filed with the

District Court while the other motions were pending, were dismissed as being moot.

On December 14, 1981, Hughes-Bechtol filed a motion to alter or amend the judgment and request to admit exhibits into evidence. In its Decision and Entry of February 17, 1982, the District Court also overruled this motion of Hughes-Bechtol. (App. p. 162)

On December 11, 1981, while the District Court proceedings were pending, Hughes-Bechtol, in an attempt to pursue all possible means of legal redress, contemporaneously sought relief based on the same factual allegations by filing a claim in the West Virginia Court of Claims, requesting that the Court of Claims affirm the first arbitration award. Hughes-Bechtol again notes that the Court of Claims is not a judicial court but rather an advisory body to the West Virginia Legislature.

On July 26, 1982, the West Virginia Court of Claims issued its decision, upholding the

arbitration process as the accepted form of dispute resolution, even when a state agency is involved, and awarding Hughes-Bechtol FIVE HUNDRED FORTY-TWO THOUSAND NINE HUNDRED EIGHTY-TWO AND 11/100 DOLLARS ($542,982.11). (App. p. 197). The Court of Claims' award was submitted to the West Virginia Legislature for appropriation of the funds to honor the award. This appropriations procedure is mandated by West Virginia Code Section 14-2-23. In February, 1983, a subcommittee of the West Virginia Senate flatly refused to honor the Court of Claims' award recommendation and returned the matter to the Court of Claims for a full evidentiary de novo hearing. (App. p. 205). To this date such a hearing has not yet been held.

Meanwhile, Hughes-Bechtol had properly taken an appeal under 28 U.S.C. §1291 from the December 4, 1981 decision and entry and the February 17, 1982 decision and entry. The appeal process following the Court of Claims'

favorable decision was stretched out over an extended period of time because of continuances sought in the now obviously vain hope that the parallel process in the West Virginia Court of Claims would resolve the dispute and moot the appeal. After the inordinate delay caused by processing the claim through West Virginia's Court of Claims, and then failing to have the award recommendation acted upon by the West Virginia Legislature, the Sixth Circuit redocketed the appeal and the matter was argued on April 4, 1984.

On June 18, 1984, the Court of Appeals affirmed the District Court's decisions and entries dismissing Hughes-Bechtol's Complaint for lack of jurisdiction. A judgment to that effect was entered on June 19, 1984.

C. The District Court's Decision

The District Court's dismissal of Hughes-Bechtol's action, as outlined in its Decision and Entry of December 4, 1981, was

based on (1) a lack of subject matter jurisdiction and (2) the existence of sovereign immunity. Although conceding that Hughes-Bechtol and the Board were "technically 'residents' of different states and would thus seem to satisfy diversity requirements [under 28 U.S.C. §1332 (1970)]", the District Court found that "the Board is an arm of the State of West Virginia" and therefore the "Board of Regents may not be considered a citizen for the purpose of invoking diversity jurisdiction" as determined by this Court in Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894). (App. p. 88).

After finding that diversity jurisdiction did not exist, the District Court reviewed the case to determine if federal question jurisdiction existed. The Court found that Hughes-Bechtol's assertion that a federal question had arisen under the Eleventh Amendment was not well taken because the "issue is merely an anticipation of a defense

and does not constitute an element of Hughes-Bechtol's claim, which is for a declaratory judgment and for the enforcement of an arbitration decision. As such, the Eleventh Amendment issue does not invoke this Court's federal question jurisdiction in light of the Supreme Court's ruling in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974)." (App. pp. 102-103).

The Court also found that the Declaratory Judgment Act, 28 U.S.C. §2201 (1958), did not extend independent jurisdiction to the federal courts, but "is a procedural remedy which can only be afforded where another basis of jurisdiction already exists." (App. p. 104).

Additionally, the Court found that the Federal Arbitration Act, 9 U.S.C. §1 et seq. (1970), specifically "§9 was only intended as a guide to where arbitration should take place when no agreement had been made by the parties, and was not intended as an independent grant of jurisdiction in federal

courts." (App. p. 119). Therefore, "the Court concludes that in actions brought to confirm arbitral (sic) awards under §9 of the Arbitration Act, the same prerequisite, of an independent ground of federal jurisdiction, applies as has been required in actions involving other sections of the Act. Having found no diversity jurisdiction between the parties herein, and no basis for federal jurisdiction other than the United States Arbitration Act, the Court concludes that it does not have subject matter jurisdiction over the present controversy." (App. pp. 119-120).

Although stating that resolution of the jurisdictional issue was dispositive of the case, the District Court proceeded to address the issue of "sovereign immunity."

In addressing this issue, the court assumed that the activities engaged in by the Board in soliciting bids, etc., constituted "interstate commerce" and reviewed the Federal Arbitration Act to determine if Congress had

intended to abrogate a state's sovereign immunity under the Act. Since no express intent to abrogate a state's sovereign immunity was found in the legislative history of the Federal Arbitration Act, the Court concluded that, under Missouri Employees, West Virginia's sovereign immunity remained intact. Finding this conclusion to be dispositive of the issue, the Court did not address the further question of whether the Board has waived its immunity by engaging in extensive interstate commerce after passage of the Act.

The Court concluded by stating that

> "thus, since the Board, as an arm of the State of West Virginia, is immune from suit under both State and federal law, the within action against the Board of Regents is barred. In so holding, the Court notes that the Plaintiff does have a viable remedy against the Board in the West Virginia Court of Claims." (Emphasis added). (App. p. 149).

D. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's Decision and Entry of December 4, 1981. In its review of the case, the Court of Appeals determined that "the question whether the Board is and was a citizen of West Virginia or an agency or alter-ego of the State for purposes of diversity jurisdiction is purely a question of federal law. . . . In this case, however, we hold that it is governed by the law of West Virginia." (App. p. 177). With this as its premise, and in referring to the District Court's opinion, the Court of Appeals concluded that "the Constitution, statutes, and federal and state case law of West Virginia, as well as the undisputed facts, are dispositive of the status of the Board as an agency and alter-ego of the State, and the absence of diversity jurisdiction in this case". "The District Court had no jurisdiction to determine appellant's rights under 28 U.S.C. §1331(a) involving the

Eleventh Amendment to the Constitution, as this statute does not confer jurisdiction." (App. p. 183).

The Sixth Circuit found that suit in the case was, for all intents and purposes, against the State of West Virginia and, even if consent to suit had been given by West Virginia, it would not suffice to create diversity jurisdiction.

The Sixth Circuit adopted many of the factual findings of the District Court in rendering its opinion. Specifically, the Sixth Circuit thought it important that:

> 12. The other contractors on the Henderson Center project have agreed to pursue remedies for contractual claims against the Board in the West Virginia Court of Claims. (App. pp. 175-176).
>
> 20. The State of West Virginia has authorized suit to be brought against the State in the West Virginia Court of Claims. (App. p. 177).

and so stated that "the state courts of West Virginia that have jurisdiction over the Board can be resorted to by appellant." (Emphasis

added). (App. p. 184). The Court otherwise declined to address the Eleventh Amendment issues raised by appellant.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT PLAINLY ERRED BY FAILING TO EXERCISE FEDERAL QUESTION JURISDICTION PURSUANT TO 28 U.S.C. §1331.

A. The Courts Below Erred By Failing To Protect Hughes-Bechtol's Due Process Rights.

It is the established law in the United States that valid contracts have the status of property for the purpose of guaranty of due process of law and, as such, are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States. Lynch v. U.S., 292 U.S. 591, 78 L.Ed. 1434, 54 S.Ct. 840 (1934); overruled on other grounds, Thorpe v. Housing Authority of Durham, 393 U.S. 268, 21 L.Ed.2d 747, 89 S.Ct. 518 (1969).

> "The constitutional prohibition against the deprivation of property without due

> process of law reflects the high value, embedded in constitutional and political history, that is placed on a person's right to enjoy what is his, free of governmental interference."

Fuentes v. Shevin, 407 U.S. 69, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). These pronouncements by this Court are designed to protect that which is guaranteed to every citizen of the United States under the Due Process Clause of the Fifth and Fourteenth Amendments. Corporations are, of course, also fully entitled to the protection of the due process clause in their property or their property rights, Pierce v. Society of Sisters, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925).

As of April 5, 1979, when Hughes-Bechtol signed the construction contract, it acquired valuable and substantial property rights guaranteed to be inviolate by states, or others acting under color of state law, under the Fifth and Fourteenth Amendments. Because of delays in the progress of the construction

project, caused by the Board's failure to provide supervision, Hughes-Bechtol incurred additional expenses found in the two arbitrations to be almost $1,000,000 which under the terms of its contract, it is entitled to recover from the Board. Hughes-Bechtol has tried to recoup these expenses, but has been unable to exercise its contract rights because of the Board's assertion that it is the State of West Virginia, endowed with sovereign immunity.

The deprivation of Hughes-Bechtol's contract property rights by the State of West Virginia is in no wise reasonably based, or otherwise legitimate because the denial of Hughes-Bechtol's contract property rights in no way promotes the morals, health, safety and welfare of the inhabitants of West Virginia. By effectively thwarting Hughes-Bechtol's attempt to exercise these contract rights, the State of West Virginia and the Courts below have acted contrary to the fundamental

principles of liberty and justice by impairing the value of Hughes-Bechtol's contract. In Re Groban, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957). This Court previously held in Smith v. Texas, 233 U.S. 630, 58 L.Ed. 1129, 34 S.Ct. 681 (1914), that the right to life, liberty, property, and the equal protection of the law are so related that deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. Hughes-Bechtol's business life has been severely threatened. Specifically, the rights acquired in the contract with the Board are being usurped. Hughes-Bechtol has never had, and never will have, a day in a judicial court so as to protect its procedural and substantive due process rights unless this Honorable Court exercises its supreme judicial power to protect Hughes-Bechtol's constitutional rights. For whatever reason, neither of the courts below addressed the "due process" issue. The Courts below both stated

that an adequate remedy to Hughes-Bechtol's contract dispute existed in the West Virginia state court system. Hughes-Bechtol, in point of fact, has no adequate state remedy.

The body by which the Courts below believed Hughes-Bechtol had an adequate remedy is the West Virginia Court of Claims, created as an arm of the West Virginia legislature, whose purpose is to hear claims against the State. Hughes-Bechtol pursued its claim in the West Virginia Court of Claims and received a favorable judgment on July 26, 1982. However, the Court of Claims award - by statute - must go to the West Virginia Legislature for the appropriation of the money necessary to meet the award recommended. This procedure is mandated by West Virginia Code Section 14-2-23. By this circuitous fashion, the award must come from a totally discretionary legislative appropriation involving state revenues. Hughes-Bechtol has maintained continuously that other means of

satisfying the award exist, other than by an appropriation from the Legislature. Specificially, Hughes-Bechtol notes that (1) existing funds in the Construction Fund by which the Henderson Center project was financed could be called upon to pay Hughes-Bechtol's award; (2) the Board has authority pursuant to West Virginia Code Section 18-12B-2, to issue additional revenue bonds to meet existing obligations associated with this construction project; and, (3) the Board may have an insurance policy or performance bond guaranteeing payment to the contractors. This potential surety situation presently cannot be confirmed because the premature dismissal of the case below has precluded discovery which might have unearthed such bond. In the face of all these possible means of satisfying its claim from private funds, Hughes-Bechtol has been told repeatedly that an adequate - and the only- remedy exists in the Court of Claims and the discretion of

the legislature. The West Virginia Legislature denied the Court of Claims' recommendation. Contrary to the beliefs of the Courts below and the representation of West Virginia officials, Hughes-Bechtol is without an adequate remedy in state court.

B. The Legislative Remedy In The Court of Claims Is Constitutionally Insufficent and Fails to Guarantee Due Process of Law

It is clear that Hughes-Bechtol had a valuable property right founded in the Arbitration provisions for dispute resolution in its construction contract and the subsequent authorization to have any Arbitration decision made effective by an appropriate judicial court of record.

The essence of Hughes-Bechtol's due process deprivation is the fact that the only remedy provided under West Virginia law to redress a taking of private property in the context of this case is a legislative and discretionary remedy as opposed to a judicial remedy. Both of the courts below based their

decisions, in part, upon the implicit understanding that the legislative remedy was adequate to satisfy the due process requirements of the Fifth and Fourteenth Amendments. Hughes-Bechtol submits that the lower courts' determination is simply not so constitutionally. The Constitution of the United States, in the opinion of the writer, requires an impartial judicial remedy for the deprivation of an individual's property by a governmental agency. In spite of the opinions of the courts below, it is clear that no such remedy has been found to exist in this case. An extremely important question calling for resolution by this Court is whether a remedy which is exclusively legislative and discretionary will satisfy the demands of due process. The courts below answered this question in the affirmative.

Each year, the method of raising capital by the sale of revenue bonds is increasing in popularity. State agencies are financing

construction projects by this method because of the larger pool of resources it creates. Consequently, there is also an increase in the number of construction contracts between private businesses and governmental agencies. In light of the Eleventh Amendment's prohibition against suing the state, the growing need for the establishment of a judicial remedy to redress the wrongs committed by governmental agencies in these contractual contexts is readily apparent. This Honorable Court is urged to address the issue whether a legislative remedy in a traditional breach of contract setting is constitutionally sufficient and meets the strict standards established by the due process clause whenever the deprivation of private property of governmental agencies occur.

C. The Lower Courts Erred In Failing To Address The Obvious Conflict Between The Fifth, Fourteenth And Eleventh Amendments.

By failing to identify Hughes-Bechtol's property rights and the due process violations, and thus failing to protect such rights, the courts below compounded that error by not addressing the obvious conflict that arose when the the Board moved to dismiss the case based on sovereign immunity accorded the states under the Eleventh Amendment. The Courts below have plainly erred in failing to protect Hughes-Bechtol's property rights by dismissing Hughes-Bechtol's case based on (1) a lack of diversity jurisdiction and (2) sovereign immunity. Both bases for dismissal are interdependent in that they both are dependent on the determination that the Board is the State of West Virginia and both are directed to the establishment of jurisdiction under 28 U.S.C. §1332. The due process issue creates a federal question and establishes jurisdiction under 28 U.S.C. §1331. The Courts below had jurisdiction to hear

Hughes-Bechtol's case on the merits, and failed to exercise that jurisdiction.

The facts of the case clearly presented a conflict between Hughes-Bechtol's due process rights and the Board's "alleged" sovereignty and immunity under the Eleventh Amendment. Thus, the case presents a situation whereby the Fifth, Fourteenth and Eleventh Amendments to the United States Constitution are at loggerheads.

II. THE DECISIONS BELOW DO NOT ACCORD WITH DECISIONS OF THIS COURT AND HIGHLIGHT A CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARDS FOR DETERMINING WHEN A STATE AGENCY IS A CITIZEN FOR THE PURPOSE OF FEDERAL DIVERSITY JURISDICTION UNDER 28 U.S.C. §1332.

The lower courts, in ignoring existing cases with precedential value to the case sub judice have effectively denied to Hughes-Bechtol its substantive due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and, unjustly deprived Hughes-Bechtol of a property right without just compensation. By

determining that the Board was an agency of the State of West Virginia, and could not be a citizen for the purpose of diversity jurisdiction, the lower courts misapplied a decision of this Court and ignored conflicting decisions of other Circuit Courts which addressed the issues of what factual circumstances will suffice to cause a state agency to become a citizen for the purpose of diversity jurisdiction pursuant to 28 U.S.C. §1332. By totally failing to consider the factors critical to the determination that the Board, although a state agency, is a citizen for diversity jurisdictional purposes under the facts of this case, the lower courts have completely foreclosed Hughes-Bechtol from exercising its due process rights guaranteed under the Constitution.

A. The Courts Below Erred By Finding That The State Of West Virginia Was The Real Party In Interest.

The Courts below found that the Board is an agent of the State of West Virginia and, by

virtue of its agency relationship, shares the State's sovereignty. Furthermore, because of the agency relationship, the courts below determined that the Board is not a citizen for diversity - of - citizenship jurisdictional purposes.

The Sixth Circuit found as compelling authority this Court's decision in State Highway Commission of Wyoming v. Utah Construction Co., 278 U.S. 194, 73 L.Ed. 262, 49 S.Ct. 104, (1929) (Wyoming Highway Commission), wherein this court stated that, if in a suit brought against a state agency, it is the state that is the real party in interest, then no diversity - of - citizenship jurisdiction exists so as to maintain an action in federal court wherein diversity is the only basis for jurisdiction. The Sixth Circuit, in being guided by Wyoming Highway Commission, found that this

> **"Court appeared to premise its determination that the State was the real party in interest on the**

> following factors: (1) the highway commission was merely an arm or alter ego of the state, 'with no funds or ability to respond in damages,' CITATION OMITTED, and (2) neither the Highway Commission nor its members had assumed any direct or personal responsibility by entering into the contract in question. CITATION OMITTED. Significantly, the Court found it unnecessary to consider the effect of the State's grant to the Highway Commission of the power to sue or be sued, or its later withdrawal of that power. CITATION OMITTED. The Court indicated that since the State was not considered to be a citizen for purposes of diversity, '[N]o consent by the State to submit itself to suit could affect the question of diverse citizenship.' CITATION OMITTED. Thus, even should a state consent to suit in federal court, that act itself cannot create diversity jurisdiction."

Hughes-Bechtol respectfully suggests that the Sixth Circuit has plainly erred in applying Wyoming Highway Commission to the facts of the case sub judice.

Wyoming Highway Commission is readily distinguished from this case. In Wyoming Highway Commission, the Utah Construction Company contracted with a state agency that

had no indicia of corporateness, therefore, not even a hint of independence from the State of Wyoming was ever created. Additionally, the contract between the Highway Commission and Utah Construction Company expressly stated that the State of Wyoming would be paying the construction company on the contract and any liquidated damages payable by the contractor would go to the State of Wyoming. It was more than apparent that Utah Construction Company was dealing with the State of Wyoming.

Unlike Wyoming Highway Commission, the facts of this case do involve indicia of corporateness and independence insofar as the Board is concerned. Specifically, West Virginia Code Section 18-26-3 states that

> There is hereby created a state agency to be known as the West Virginia Board of Regents, which shall be a corporation and as such may contract and be contracted with, plead and be impleaded, sue and be sued, and have and use a common seal. (1969, c. 130). (Emphasis added).

In addition to the corporate status of the Board, the Board also has ownership of the state colleges and universities of West Virginia. As owner of Marshall University, the Board drafted and entered into the construction contract.

Further highlighting its independence - the Board was, and is, financially independent of the State of West Virginia insofar as the Henderson Center construction project which involved Hughes-Bechtol is concerned. In 1977, the West Virginia Legislature authorized the Board to issue $51.7 million dollars in revenue bonds in order to raise the money to finance, inter alia, the Henderson Center construction project. The proceeds from the revenue bonds came from a public sale in interstate commerce. Thus, the funds used to finance the Henderson Center project involving Hughes-Bechtol were all derived from private sources. No West Virginia state funds were involved. In fact, West Virginia expressly

denied any pledge of the State's taxing power or debt services to guarantee the bonds. Clearly, these two cases are separate and distinct in their factual patterns, and Wyoming Highway Commission was erroneously extended and adopted as controlling precedent in the case sub judice.

B. The Decisions Of The Courts Below Conflict With Decisions Of Other Circuits Regarding Suits Against State Agencies.

In determining whether or not a state agency is the real party in interest and thus a citizen for the purpose of diversity-of-citizenship jurisdiction, this Court and the Circuit Courts of the federal system have separately endeavored to develop a set of cogent criteria, starting with the basic premise outlined in Wyoming Highway Commission, i.e., if the State is the real party in interest then suit against a state agency cannot be maintained in federal court

on the basis of diversity-of-citizenship jurisdiction. Conversely, if the State is not the real party in interest, then the agency is a citizen for diversity purposes. The decisions of the courts below necessarily hold - albeit improperly - that the State of West Virginia was the real party in interest. The lower courts' determination is plainly erroneous because the fact-specific nature of the case clearly established the Board in its capacity as owner of the revenue bond proceeds and not as an agent of the state, as the real party in interest.

Federal case law reflects a continuing attempt to identify the indicia which are seen as the determinative factors whether a state agency is so closely associated with the State so as to be deemed the State or sufficiently disassociated from the State so as to be deemed an independent body. In making such a determination the following factors have been considered:

(1) WHETHER A LEGISLATIVE PROVISION EXISTS ESTABLISHING THAT THE AGENCY MAY SUE OR BE SUED:

(a) Cases which have determined that this factor is indicative of the agency being a citizen for diversity purposes:

(i) Kirby Lumber Corp. v. Louisiana, 293 F.2d 82 (5th Cir. La., 1961);

(ii) Kansas Turnpike Authority v. Abramson, 275 F.2d 711 (10th Cir. Kan., 1960), cert. den. 363 U.S. 813, 4 L.Ed.2d 1154, 80 S.Ct. 1250;

(iii) Krisel v. Duran, 386 F.2d 179 (2d Cir. N.Y., 1967) cert. den. 390 U.S. 1042, 20 L.Ed.2d 303, 88 S.Ct. 1635;

(iv) Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. Tenn., 1978);

(v) Department of Health & Rehabilitative Services v. Davis, 616 F.2d 828 (5th Cir. La., 1980).

(b) Cases which have determined that this factor is not indicative of the agency being a citizen for diversity purposes:

(i) State Highway Com. v. Utah Construction Co., 278 U.S. 194, 73 L.Ed. 262, 49 S.Ct. 104 (1929);

(ii) Broadwater-Missouri Water Users' Assocation v. Montana Power Co., 139 F.2d 998 (9th Cir. Montana, 1944).

(2) WHETHER AN IMPLIED POWER TO SUE OR BE SUED EXISTS:

(a) Absence of express power to sue or be sued is not indicative of agency not being a citizen for diversity purposes:

(i) C.H. Leavell & Co. v. Board of Commissioners, 424 F.2d 764 (5th Cir. La., 1970).

(3) WHETHER LEGISLATIVE PROVISION EXISTS STATING THAT THE AGENCY PERFORMS ESSENTIAL GOVERNMENTAL FUNCTIONS:

(a) Cases which hold that the agency is not a citizen for purposes of diversity jurisdiction:

(i) Fowler v. California Tollbridge Authority, 128 F.2d 549 (9th Cir. Calif. 1942).

(b) Cases indicative that agency is citizen for purposes of diversity jurisdiction:

(i) Gerr v. Emrick, 283 F.2d 293 (3rd Cir. Pa., 1960) cert. den. 365 U.S. 817, 5 L.Ed.2d 695, 81 S.Ct. 698.

(4) WHETHER A LEGISLATIVE PROVISION EXISTS STATING THAT THE AGENCY TAKE PROPERTY IN THE NAME OF THE STATE:

(a) Cases indicative that state is real party in interest.

(i) Fowler, supra

(b) Cases not indicative that state is real party in interest.

(i) Montana Power Co., supra

(5) WHETHER AGENCY HAS POWER TO TAKE PROPERTY IN ITS OWN NAME:

(a) Cases indicative that agency is citizen for diversity purposes because it is real party in interest:

(i) Dept. of Highways v. Morse Bros. & Associates, Inc. 221 F.2d 140 (5th Cir. La., 1954).

(ii) C.H. Leavell & Co., supra.

(iii) Lenoir, supra.

(6) WHETHER THE AGENCY HAS CORPORATE STATUS OR NOT:

(a) Cases indicative that agency is a citizen for diversity purposes:

(i) Morse Bros., supra.

(ii) Kansas Turnpike Authority, supra.

(iii) Lenoir, supra.

(iv) Davis, supra.

(b) Cases indicative that absence of corporate status establishes agency as not being a citizen for diversity purposes:

(i) Krisel, supra.

(ii) State Highway Commission v. Kansas City Bridge Co. 81 F.2d

689, (8th Cir. Ark., 1936) cert. den. 298 US 661, 80 L Ed 1386, 56 S. Ct. 682.

(7) WHETHER THE AGENCY IS FINANCIALLY DEPENDENT ON THE STATE:

(a) Cases indicative that financial dependency of agency establishes agency as arm or alter-ego of state and thus is not a citizen for diversity purposes:

(i) Utah Constr. Co., supra.

(ii) Blease v. Safety Transit Co., 50 F.2d 852 (2d Cir. South Carolina, 1931).

(iii) Dacey v. Florida Bar, Inc., 414 F2d 195 (5th Cir. Fla., 1969) cert. den. 397 U.S. 909,25 L.Ed. 2d 89, 90 S. Ct. 906.

(iv) Hertz v. Knudson, 6 F2d 812 (8th Cir. Minn. 1925).

(v) Kansas City Bridge Co., supra.

(vi) North Dakota v. National Mill & Cereal Co., 114 F.2d 777 (8th Cir. ND, 1940).

(vii) Fowler, supra.

(viii) Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. Arizona, 1981).

(b) Cases holding that the absence of financial dependency on the state is indicative that agency is citizen for diversity purposes.

(i) Missouri, K & T.R. Co. v. Missouri R & Warehouse Comrs., 183 U.S. 53, 46 L.Ed 78, 22 S.Ct. 18 (1901).

(ii) Blease, supra.

(iii) Kansas Turnpike Authority, supra.

(8) WHETHER STATE COURT DECISIONS HAVE FOUND AGENCY TO BE INDEPENDENT OF STATE OR NOT:

(a) cases which determine that agency is separate:

(i) Gerr v. Emrick, supra.

(ii) Kirby Lumber Corp., supra.

(iii) Montana Power Co., supra.

It is patently obvious that the presence or absence of one or more of the above factors has been determinative of whether or not a state agency will be deemed to be a citizen for the purpose of diversity jurisdiction. This ad hoc application of these factors in trying to determine who is the real party in interest has created inconsistency in litigation at the federal level whenever a

state agency is involved. This inconsistency exists because of the absence of a definite statement from this Court establishing guidelines to determine when a state agency becomes sufficiently independent of the state so as to become a citizen for diversity purposes and can be subjected to suit in federal court pursuant to 28 U.S.C. §1332.

Presently, one does not know whether the above-referenced eight factors, in and of themselves, are the only factors which are determinative of citizenship status for a state agency. Nor could a potential litigant state with assurance that if, for example, four out of the eight factors existed in a particular case, his action would be maintainable in federal court, assuming the other prerequisites to the establishment of diversity jurisdiction exist.

Neither do the cases reflect a clear trend as to whether the test for determining the real party in interest is to be "factual"

in nature, and thus objective, or whether there is to be a "balancing" of the above-referenced factors, making the test more subjective in nature, and subject to considerable judicial discretion. Hughes-Bechtol suggests it is time that this Court establish guidelines to remove the real probability that, for example, a state agency in one of the core of states comprising the Ninth Circuit would not be a citizen for diversity purposes and not subject to suit in federal court, yet a parallel state agency in one of the states comprising the Fifth Circuit, faced with the same set of facts and circumstances, would be a citizen for diversity purposes and subject to suit in federal court. This Court is urged to address the "real party in interest" issue as it impacts on state agencies and 28 U.S.C. §1332, so as to preclude future situations not unlike the case sub judice wherein Hughes-Bechtol's

substantive due process and civil rights are being violated.

Hughes-Bechtol would point out that neither the District Court nor the Court of Appeals engaged in any factual analysis consistent with other circuit court decisions, but merely accepted the assertion of the Board that it was a state agency, and, as a matter of law, the state for diversity purposes. There is no doubt that had a fact sensitive analysis been undertaken - after due discovery, which was not permitted herein - sufficient indicia of independence would have been evidenced to support diversity jurisdiction. This implicit conflict between circuits clearly calls for the exercise of the review powers of this Honorable Supreme Court.

III. THE COURTS BELOW ERRED IN APPLYING THE FEDERAL ARBITRATION ACT.

A. The Courts Below Failed To Give Proper Weight To The Impact Of The Federal Arbitration Act Upon The Eleventh Amendment Defense Of State Immunity And Of The

Fact That It Was The U.S. Treasury And Not The West Virginia Treasury Which Supported The Sale Of Bonds.

But for the assertion that the Board enjoyed the same status of immunity as the State of West Virginia itself, diversity jurisdiction between the Ohio corporation, Hughes-Bechtol, and the West Virginia corporation, the Board of Regents, was proper. In other words, all of the elements required by 28 U.S.C. 1332 were present: corporate residence in separate states, an appropriate jurisdictional amount and sufficient contacts with the State of Ohio on which to base venue in the District Court at Dayton, Ohio. Thus, a separate ground for jurisdiction apart from any jurisdiction granted by the Federal Arbitration Act, existed. Such jurisdiction was divested however, by the Board's invoking the constitutional prohibition of the Eleventh Amendment. The Board had taken full advantage of the benefits bestowed upon it pursuant to

the commerce clause of the United States Constitution both in the sale of bonds to establish a construction fund, the solicitation of and contracting with multi-state contractors and, perhaps as significant as any other factor, availing itself of the advantage of tax exempt securities to achieve a favorable input of foreign interstate capital. With respect to this latter factor, Hughes-Bechtol would urge this Court to consider the fact that it is the people of the United States, not the people of West Virginia, who are supporting through their taxing power, the construction of the Marshall University buildings; i.e. the amount of money represented by the tax free payments of interest on the bonds sold in interstate commerce deprives the Treasury of the United States. The people of the United States having subsidized the erection of the buildings at Marshall University by tax exemption and having provided by their

securities laws for the marketing in interstate commerce of the underlying bonds have a right to expect that their substantive laws will have primacy over mere labels placed upon state agencies the result of which is to divest the Federal Court's jurisdiction and to emasculate the Federal Arbitration Act. Hughes-Bechtol notes in this context that the Board held out arbitration, and the Federal Arbitration Act by implication, as an inducement to Hughes-Bechtol to enter into its interstate contract. Hughes-Bechtol respectfully submits that the Court of Appeals in this case has decided an important question of federal law, namely whether the Federal Arbitration Act confers an implicit consent to federal suit by a state agency whose only defense is an Eleventh Amendment divestiture of otherwise appropriate Federal Court jurisdiction. This question has not been, but should be, settled by this Court.

B. <u>There Were Several Independent Bases</u>

For Jurisdiction To Support The Federal Arbitration Act, 9 U.S.C. §1 et seq., And The Declaratory Judgment Statute, 28 U.S.C. §2201

The deprivation of Hughes-Bechtol's property gave rise to a due process issue which created the basis for federal question jurisdiction under 28 U.S.C. §1331. In light of the District Court's thorough analysis of the Federal Arbitration Act, and the Declaratory Judgment statute, and the Court's determination that an independent basis for jurisdiction need exist, Hughes-Bechtol respectfully states that the due process issue provides that independent basis for jurisdiction.

Additionally, the conflict between the Fifth, Eleventh and Fourteenth Amendments to the United States Constitution created another federal question basis for jurisdiction and an independent source of support for the Federal Arbitration Act and the Declaratory Judgment statute. However, the Courts below failed to

recognize Hughes-Bechtol's due process problem, and therefore, indirectly assisted in depriving Hughes-Bechtol of its property without just compensation.

IV. IN PREMATURELY DISMISSING PETITIONER'S CASE, THE COURTS BELOW HAVE ALLOWED A CONTINUING FRAUD THAT HAS CAUSED THE DEPRIVATION OF PETITIONER'S PROPERTY RIGHTS IN VIOLATION OF DUE PROCESS OF LAW AND MISAPPLIED THE DECISION OF THIS COURT IN SCHEUER V. RHODES, 432 U.S. 232, 40 L.Ed.2d. 90, 94 S.Ct. 1683 (1974).

Historically, states have been afforded the protection of sovereign immunity. The courts below found that the Board, as an agency of the State of West Virginia, was, in effect, sovereign. As such, the Board enjoys the sovereign immunity of the Eleventh Amendment and Article VI, Section 35 of the West Virginia State Constitution.

It has long been the rule of this Court that:

> "Although a state may not be sued without its consent, such immunity is a privilege which may be waived." Clark v. Barnard, 108 U.S. 436, 774, 27 L.Ed. 780, 784, 2 S.Ct. 878 (1882).

Consential waiver of the state's sovereign immunity has often come by way of voluntary submission to a court's jurisdiction. Clark, supra; Reagan v. Farmers Loan & Trust Co., 154 U.S. 362 (1893); and Gunter v. Atlantic Coast Line Railroad Company, 200 U.S. 477 (1906). However, any express manifestation of the intent to discard this privilege is consistent with the concept of "waiver". In the case at bar, the State of West Virginia, by statute, has expressly discarded the Board's sovereign immunity privilege.

It is a well-established principle that, unless prohibited by an immunity doctrine, precluding a suit against a governmental entity for mispresentations by its officials or employees, a public authority may be held liable, to the same extent as a private

individual or firm, for the concealment of undisclosed facts known by it, where the public entity makes positive misrepresentations directly concerning the matters to which the undisclosed facts relate. Christie v. United States, 237 U.S. 234, 59 L.Ed. 933, 35 S.Ct. 565 (1915); Aerodex, Inc. v. United States, 189 Ct. Cl. 344, 417 F.2d 1361 (1969); United States v. Beuttas, 324 U.S. 768, 89 L.Ed. 1354, 65 S.Ct. 1000 (1945).

Before causing the construction contract to be signed on its behalf, the Board - in accordance with West Virginia law - had the contract reviewed and approved by the Commissioner of West Virginia Department of Finance & Administration; the contract was reviewed and "approved" by the Director, Purchasing Division, as to "provisions and terms"; and, the contract was "approved as to form" by the West Virginia Attorney General's Office. After Hughes-Bechtol's had done the work and attempted to exercise its contract

rights, it was informed by the Board that the Board had made a mistake in including in the contract the very arbitration provision Hughes-Bechtol was relying upon. The Board repudiated the contract. The West Virginia Attorney General stated, on behalf of the Board, that the Board was constitutionally precluded from engaging in binding arbitration or submitting itself to suit, citing Article VI, Section 35 of the West Virginia Constitution as authority; and, that any provision that attempted to bind the Board contractually was void as a matter of law.

The Board has received the complete benefit of the bargain and has been enjoying the use of the facilities worked on by Hughes-Bechtol for approximately two years. Hughes-Bechtol is still without complete relief under the contract. The Board, through its personnel, misrepresented to Hughes-Bechtol the extent of its authority to engage in a binding contractual arrangement.

Because the Board failed to state this "non-binding" point but in actuality held itself out as being an independent corporate body with authority to solicit bids, negotiate the terms and draft the contract, this omission of a fact material to the contractual agreement of the parties has mislead Hughes-Bechtol to its financial detriment. The impairment of the value of the contract, based on the misrepresentation of state officers clearly establishes the basis for a civil rights cause of action under 42 U.S.C. §1983 against these state officers.

The Courts below, by failing to follow the dictates of Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974) have deprived Hughes-Bechtol of its 1983 cause of action. This Court said in Scheuer:

> Under 42 USCS §1983, [which provides] a civil action for violation of federal rights by state officials under color of state law, the acts of a. . .high executive officer do not have the quality of a supreme and unchangeable edict,

> overruling all conflicting rights of property; these acts are reviewable through the judicial power of the federal government.

Hughes-Bechtol's third claim for relief was based on an allegation of "fraud in the inducement." Hughes-Bechtol sued nominally the West Virginia Board of Regents because the contract was with the Board. Hughes-Bechtol believed that, through discovery, the state officials who effected the fraud would be identified and an amended complaint would be filed with the District Court, naming the perpetrators. It is a matter of basic corporation law that a corporation acts through its agents. Hughes-Bechtol's allegations of misrepresentation and fraud were based on representations, or omissions, made to Hughes-Bechtol regarding facts material to the construction contract by agents and/or representives of the Board in their official capacity.

This Court said in Scheuer, supra, that

> "through the civil rights statutes, Congress intended to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it."

If the Board is a state agency, and through its personnel has induced Hughes-Bechtol to contract with it, and then has denied the contract obligations after having reaped the benefits thereof, there can be no more blatant a violation of Hughes-Bechtol's civil rights.

Under Scheuer, supra and Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975), this court held that executive immunity is not absolute, in nature, but qualified. "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under the statute." [42 USCS §1983]. Scheuer, 416 U.S. at 243.

At a minimum, the facts of the case sub judice establish the basis for a cause of action under 42 U.S.C. §1983.

Under Wood, 420 U.S. at 321-323, this court stated that

> While on the basis of common-law tradition and public policy, school officials are entitled to a qualified good faith immunity from liability for damages under the Civil Rights Act, they are not immune from such liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights. . . if they took the action with malicious intent to cause a deprivation of such rights or other injury. . .[and] a compensatory award is appropriate only if the officials acted with such an impermissible motivation or with such disregard of clearly established constitutional rights that their action could not reasonably be characterized as in good faith. 42 U.S.C.A. §1983. (Emphasis added).

Although respondents in Wood were students, there is no apparent reason why this Court's standard for a qualified executive immunity available to the superintendent of a

school district would not also be applicable to a regent of a college or university, or agent thereof, when that party acts in his official capacity to the detriment of others.

A qualified immunity that would inure to the benefit of a regent under Wood, supra, and Scheuer, supra, is in stark contrast to the immunity which the Board and its agents claim, and that immunity which was recognized by the Courts below, which is absolute in nature. In adopting Kondos v. West Virginia Board of Regents, 318 F. Supp. 394 (S.D. W.Va. 1970), aff'd, 441 F.2d 1172 (4th Cir. 1971), the courts below concurred in the finding that "since the State's immunity is absolute [it] cannot be waived by the state legislature or by any other state instrumentality." (Emphasis added). The inconsistent application of Scheuer and Wood, vis-a-vis Kondos, in the case below draws into question the Supremacy Clause of the United States Constitution.

Under Article VI, Cl. 2 of the United States Constitution, it is said that

> "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It has long been this Court's position that "a rule stated in a decision of the United States Supreme Court and based upon the Federal Constitution is, under the Supremacy Clause of the Constitution, binding upon state courts as well as upon federal courts." 20 Am.Jur.2d Courts §226. While every word of a state constitution should be given its appropriate meaning and effect, however, sometime the meaning and effect of words in a state constitution may be restrained or modified by applicable controlling commands or limitations contained in the Federal Constitution. 94 ALR 804. Hughes-Bechtol is

well aware of the fact that the exercise of federal supremacy is not lightly presumed. However, the courts below have failed to follow the supreme proposition that inconsistent state laws must give way to federal law. The inequitable nature of the case sub judice, and the apparent conflict between the Supreme Court's "qualified executive immunity" and the State Court's "absolute executive immunity", which the courts below opted to follow as controlling law, must be resolved so that Hughes-Bechtol's civil rights, pursuant to 42 U.S.C. §1983, may be safeguarded. The nature of this case and the regulated subject matter permits of no other conclusion consistent with the Congressional intent behind §1983.

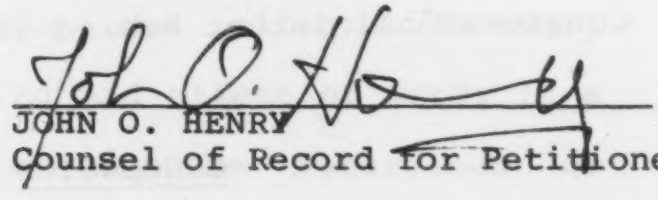
CONCLUSION

Every contract has an implied covenant of good faith. Since Hughes-Bechtol's first attempt at exercising its contract property

rights back in 1979, there has been a total lack of good faith on the part of the West Virginia Board of Regents. This Honorable Court is the court of last resort, and the only body capable of setting right the injustices herein. If Hughes-Bechtol's Fifth and Fourteenth Amendments' Due Process Rights are to be protected, as well as its civil rights under 42 U.S.C. §1983 and if the Federal Arbitration Act is not to be emasculated, this Court must grant its writ of certioriari.

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,



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84-413

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CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1984

HUGHES-BECHTOL, INCORPORATED,

Petitioner,

,VS.

WEST VIRGINIA BOARD OF REGENTS,
A Statutory Corporation,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX TO PETITION FOR A
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A. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

UNITED STATES CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a

member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE DECLARATORY JUDGMENT STATUTE, 28 U.S.C. §2201

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of Title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(As amended Oct. 4, 1976, Pub.L. 94-455, Title XIII, §1306(b)(8), 90 Stat. 1719; Nov. 6, 1978 Pub.L. 95-598, Title II, §249, 92 Stat. 2672.)

UNITED STATES CODE FEDERAL QUESTION JURISDICTION STATUTE, 28 U.S.C. §1331

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(As amended Oct. 21, 1976, Pub.L. 94-574, §2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a) 94 Stat. 2369).

UNITED STATES CODE DIVERSITY OF CITIZENSHIP STATUTE, 28 U.S.C. §1332

§1332. Diversity of citizenship; amount in controversy, costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the

sum or value of $10,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may

deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

CIVIL ACTION FOR DEPRIVATION OF RIGHTS STATUTE, 42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.

UNITED STATES ARBITRATION ACT, 9 U.S.C. §§1, 2, 4 & 9

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign

or interstate commerce. July 30, 1947, c. 392, 61 Stat. 670.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration;

notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of

the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specifically call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no

default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, §19, 68 Stat. 1233.

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated,

modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

WEST VIRGINIA CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES AND REGULATIONS

CONSTITUTION OF WEST VIRGINIA

Art. VI, § 35 State Not to Be Made Defendant in Any Court

§ 35. The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

WEST VIRGINIA CODE § 18-26-3

§ 18-26-3. West Virginia board of regents created.

There is hereby created a state agency to be known as the West Virginia board of regents, which shall be a corporation and as such may contract and be contracted with, plead and be impleaded, sue and be sued, and have and use a common seal. (1969, c. 130.)

WEST VIRGINIA CODE § 18-12B

§ 18-12B-1. Board of regents authorized to issue revenue bonds for certain capital improvements; payment of relocation costs.

The West Virginia board of regents shall have authority, as provided in this article, to issue revenue bonds of the State from time to time, either to finance the cost of major renovations, repairs and safety upgrading and providing new capital improvements consisting of facilities, buildings and structures, for those state institutions of higher education as determined by resolution of the board of regents, including any college, university or community college under its supervision, management and control, or to refund, at the discretion of the board of regents, bonds issued and outstanding under and pursuant to the provisions of this article or article eleven-B [§ 18-11B-1 et seq.] of this chapter, or both. Such major renovations, repairs and safety upgrading and capital improvements may,

in each case, include land for current or future use in connection therewith and equipment and machinery and other similar items essential or convenient in connection with the foregoing but shall not include such items as books, fuel, supplies or other items which are customarily deemed to result in a current operating charge. The principal of, interest and redemption premium, if any, on such bonds shall be payable solely from the special fund herein provided for such payment. The costs of any such major renovations, repairs and safety upgrading and capital improvements shall include the cost of acquisition of land, the construction and acquisition of any such major renovations, repairs and safety upgrading and capital improvements and equipment and machinery therefor, and the provision of roads, utilities, and other services necessary, appurtenant or incidental to the foregoing; and shall also include all other charges or expenses necessary, appurtenant or incidental

to the construction, acquisition, and financing including, but not limited to, debt service reserve requirements and capitalized interest, and placing in operation of any such major renovations, repairs and safety upgrading and capital improvements: Provided, that from time to time but not later than the first day of March, one thousand nine hundred seventy-eight, the board shall issue and sell bonds pursuant to this article in an amount which, when combined with cash available under the provisions of section two [§ 18-12B-2] of this article, will be sufficient to finance the costs of the following purposes and projects:

(1) Refunding of all bonds issued and outstanding under and pursuant to the provisions of article eleven-B [§ 18-11B-1 et seq.] of this chapter;

(2) A building to house the music, arts and theatre programs at Shepherd College, at a cost not to exceed two million five hundred thousand dollars;

(3) A field house at West Liberty State College at a cost not to exceed two million seven hundred thousand dollars;

(4) A shop and laboratory building at West Virginia State College at a cost not to exceed two million six hundred thousand dollars;

(5) A multipurpose physical education facility at Marshall University, at a cost not to exceed eighteen million dollars;

(6) A new football stadium at West Virginia University (at a different location than the existing stadium) at a cost not to exceed twenty million dollars; and

(7) An all-purpose shell building for sports and physical education at West Virginia University, at a cost not to exceed four million five hundred thousand dollars.

In the event that private real property is acquired in connection with the above enumerated projects, the board shall reimburse individuals, families and business concerns for relocation costs incurred as a consequence

of being displaced by such acquisition. With respect to payment of such relocation costs, the board shall follow the same procedure and be subject to the same limitations as required for the commissioner of highways under section twenty [§ 17-2A-20] article two-A, chapter seventeen of this Code and regulations promulgated pursuant thereto, but in no event shall such payments exceed the sum of three hundred dollars for individuals and families and two thousand five hundred dollars for business concerns. (1977, c. 90.)

§ 18-12B-2. State system tuition fee special capital improvements fund in state treasury; collections to be paid into special fund; authority of board of regents to pledge such collections as security for revenue bonds; authority of board to finance projects on a cash basis.

There is created in the state treasury a state system tuition fee special capital improvements fund to be expended by the board of regents for the benefit of the state institutions of higher education, which shall include any college, university or community

college under its supervision, management and control.

On and after the first day of July, one thousand nine hundred seventy-seven, the board of regents may periodically transfer from the special nonrevolving West Virginia University capital improvements fund created in the state treasury pursuant to the provisions of article eleven-B [§ 18-11B-1 et seq.] of this chapter, and from the special non revolving Marshall University capital improvements fund created in the state treasury pursuant to the provisions of article twelve-A [§18-12A-1 et seq.] of this Chapter, into the state system tuition fee special capital improvements fund moneys in excess of the amount pledged for the payment of the principal of, interest and redemption premium, if any, on any revenue bonds or revenue refunding bonds issued pursuant to such article eleven-B or twelve-A [§ 18-11B-1 et seq. or § 18-12A-1 et seq.] prior to the first day of July, one thousand nine hundred seventy-seven. Said Marshall

University capital improvements fund is hereby continued notwithstanding the retirement of outstanding bonds issued pursuant to such article twelve-A [§ 18-12A-1 et seq.], but on and after the first day of July, one thousand nine hundred seventy-seven, no bonds shall be issued pursuant to article twelve-A [§ 18-12A-1 et seq.], nor shall any moneys be expended (unless the board of regents shall by board action have made a commitment with respect thereto) pursuant to such article twelve-A [§ 18-12A-1 et seq.]. On and after the first day of July, one thousand nine hundred seventy-seven there shall be paid directly into such state system tuition fee special capital improvements fund subject to the prior lien and pledge, if any, of outstanding bonds issued pursuant to the provisions of articles eleven-B and twelve-A [§§ 18-11B-1 et seq. and 18-12A-1 et seq.] of this chapter all tuition fees collected under the provisions of section one [§ 18-24-1], article twenty-four, chapter eighteen of this

tuition fee special capital improvements fund as may be needed to meet the requirements of any revenue bond issue or issues authorized by this article, including the payment of principal of, interest and redemption premium if any, on such revenue bonds, the establishing and maintaining of a reserve fund or funds for the payment of the principal of, interest and redemption premium, if any, on such revenue bond issue or issues when other moneys pledged may be insufficient therefor and including such additional protective pledge of revenues and fees as the board of regents in its discretion may provide by resolution authorizing the issue of such bonds and in any trust agreement made in connection therewith, and the board of regents may further provide in such resolution and in such trust agreement, for such priorities on the revenues and fees paid into such state system tuition fee special capital improvements fund as may be necessary for the protection of the prior rights of the holders of bonds issued at

different times under the provisions of this article.

Any balance remaining in the state system tuition fee special capital improvements fund after the board of regents has issued bonds authorized by this article, and after the requirements of all funds including reserve funds established in connection with the bonds issued pursuant to this article have been satisfied, may be used (i) for the redemption of any of the outstanding bonds issued hereunder which by their terms are then redeemable, or for the purchase of such bonds at the market price, but at not exceeding the price, if any, at which such bonds shall in the same year be redeemable, and all bonds redeemed or purchased shall forthwith be canceled and shall not again be issued or (ii) for any lawful purpose for which the board of regents may expend funds.

The board of regents, in its discretion, may use the moneys in such state system tuition fee special capital improvements fund

to finance the cost of projects and purposes on a cash basis. Any pledge of moneys in such fund for revenue bonds shall be a prior and superior charge on such fund over the use of any of the moneys in such fund to pay for the cost of any project or purpose on a cash basis: Provided, that except for the projects and purposes expressly enumerated in section one [§ 18-12B-1] of this article, any expenditures from such fund, other than for the retirement of revenue bonds, may only be made by the board to meet the cost of a predetermined capital improvements program for one or more of the state institutions of higher education, in such order or priority as shall have been agreed upon by the board of regents and presented to the governor for inclusion in the annual budget bill, and only with the approval of the legislature as indicated by direct appropriation for the purpose. (1977, c. 90.)

§ 18-12B-3. Board of regents to fix and collect fees.

The board of regents shall fix, establish, maintain and collect the tuition fees provided for in section one [§ 18-24-1], article twenty-four, chapter eighteen of this Code, from students at all state institutions of higher education other than (unless the board of regents shall otherwise determine by resolution) tuition fees from students attending community colleges, in amounts at least sufficient, at all times, after depositing (subject to, or until termination of, the lien and pledge referred to in section two [§ 18-12B-2] of this article) in the special nonrevolving Marshall University capital improvements fund, and the special nonrevolving West Virginia University capital improvements fund referred to in section two [§ 18-12B-2] of this article such tuition fees as are now required to be deposited therein pursuant to section one [§ 18-24-1], article twenty-four, chapter eighteen of this Code, to

provide revenues for deposit in the state system tuition fee special capital improvements fund which are adequate to pay the principal of, interest and redemption premium, if any, on the bonds authorized to be issued pursuant to this article as the same mature and become due and to make all reserve and other payments to be required by the proceedings which authorize such bonds, and to provide any additional protective pledge of revenues and fees and reserve or other payments as the board of regents may in its discretion require by the resolution authorizing any issue of bonds pursuant to this article and any trust agreement made in connection therewith, and to make all other payments required by this article or any such proceedings, resolutions or trust agreements. (1977, c. 90.)

§ 18-12B-4. Issuance of revenue bonds; use of proceeds; bonds exempt from taxation.

The issuance of revenue bonds under the provisions of this article shall be authorized

from time to time by resolution or resolutions of the board of regents, which shall set forth the proposed major renovations, repairs and safety upgrading and capital improvements authorized by section one [§ 18-12B-1] of this article; and shall provide for the issuance of bonds in amounts sufficient, when sold as hereinafter provided, to provide moneys deemed by the board of regents sufficient to pay such costs, less the amounts of any other funds available for said costs from any other moneys of the board of regents available therefor or from any appropriation, grant or gift therefor. Such resolution shall prescribe the rights and duties of the bondholders and the board of regents, and for such purpose may prescribe the form of the trust agreement hereinafter referred to. The bonds may be issued from time to time, in such amounts, shall be of such series, bear such date or dates, mature at such time or times not exceeding forty years from their respective dates, bear interest at such rate or rates; be

in such denominations; be in such form, either coupon or registered, carrying such registration, exchangeability and interchangeability privileges be payable in such medium of payment and at such place or places within or without the State; be subject to such terms of redemption at such prices not exceeding one hundred five percent of the principal amount thereof; and be entitled to such priorities on the revenues and fees paid into the state system tuition fee special capital improvements fund as may be provided in the resolution authorizing the issuance of the bonds or in any trust agreement made in connection therewith. The bonds shall be signed by the governor, and by the president or vice president of the board of regents, under the great seal of the State, attested by the secretary of State, and the coupons attached thereto shall bear the facsimile signature of the president or vice president of the board of regents. In case any of the officers whose signatures appear on the bonds

or coupons cease to be such officers before the delivery of such bonds, such signatures shall nevertheless be valid and sufficient for all purposes the same as if such officers had remained in office until such delivery. Such revenue bonds shall be sold in such manner as the board of regents may determine to be for the best interests of the State.

Any pledge of funds and fees for such revenue bonds made by the board of regents shall be valid and binding between the parties from the time the pledge is made; and the funds so pledged shall immediately be subject to the lien of such pledge without any further physical delivery thereof or further act. The lien of such pledge shall be valid and binding against all parties having claims of any kind in tort, contract or otherwise, irrespective of whether such parties have notice of the lien of such pledge, and such pledge shall be a prior and superior charge over any other use of such funds so pledged.

The proceeds of such bonds shall be used solely for the payment of the cost of those major renovations, repairs and safety upgrading and capital improvements as generally and specifically set forth in section one [§ 18-12B-1] of this article, and shall be deposited in the state treasury in a special fund to be disbursed as provided by law for the disbursement of any other state funds. If the proceeds of such bonds, by error in calculations or otherwise, shall be less than the cost of such major renovations, repairs and safety upgrading and capital improvements, additional bonds may in like manner be issued to provide the amount of the deficiency; and unless otherwise provided for in the resolution or trust agreement hereinafter mentioned, such additional bonds shall be deemed to be of the same issue, and shall be entitled to payment from the same fund, without preference or priority, as the bonds before issued for major renovations, repairs and safety upgrading and capital

improvements. If the proceeds of bonds issued for such major renovations, repairs and safety upgrading and capital improvements shall exceed the cost thereof, the surplus may be used for such other capital improvements as the board of regents may determine or in such other manner as the resolution authorizing such bonds may provide. Prior to the preparation of definitive bonds, the board may, under like restrictions, issue temporary bonds with or without coupons, exchangeable for definitive bonds upon the issuance of such definitive bonds. The term "cost," as used in this section, shall be deemed to include all of the items contemplated by the use of that term in section one [§ 18-12B-1] of this article.

After the issuance of any of such revenue bonds, the tuition fees at the state institutions of higher education pledged therefor shall not be reduced as long as any of such revenue bonds are outstanding and unpaid except under such terms, provisions and

conditions as shall be contained in the resolution, trust agreement or other proceedings under which such revenue bonds were issued.

Such revenue bonds and the revenue refunding bonds, and bonds issued for combined purposes shall, together with the interest thereon, be exempt from all taxation by the State of West Virginia, or by any county, school district, municipality or political subdivision thereof. (1977, c. 90.)

§ 18-12B-5. Issuance of revenue refunding bonds; use of moneys; power to enter into escrow agreements; call for redemption.

The issuance of revenue refunding bonds under the provisions of this article shall be authorized by resolution of the board of regents and shall otherwise be subject to the limitations, conditions and provisions of section four [§ 18-12B-4] of this article. Such revenue refunding bonds may be issued in an amount at the option of the board of regents sufficient to pay either in full or

together with interest earned on the investment of the proceeds thereof, whether or not at the time of the issuance of the revenue refunding bonds the hereafter mentioned bonds are payable or callable for optional redemption, (1) the principal of any outstanding bonds heretofore issued pursuant to the provisions of article eleven-B [§ 18-11B-1 et seq.] of this chapter or this article (hereinafter referred to as the "outstanding bonds"); (2) the redemption premium, if any, on such outstanding bonds or the prior redemption thereof; (3) the interest due and payable on such outstanding bonds to and including the first day upon which said outstanding bonds are callable prior to maturity, not exceeding, however, ten years from the date of issuance of such revenue refunding bonds, or the dates upon which the principal of said outstanding bonds mature before such first date on which the same are callable prior to maturity, including any interest theretofore accrued and unpaid; and

(4) all expenses of the issuance and sale of said revenue refunding bonds, including all necessary financial and legal expenses, and also including the creation of initial debt service reserve funds. Any moneys in funds pledged with respect to the outstanding bonds may be used for any or all of the purposes stated in (1), (2), (3) and (4) above or may be deposited in a sinking fund or reserve fund or other funds for the issuance of bonds which have been issued wholly or in part for the purpose of such refunding. Such amount of the proceeds of the revenue refunding bonds as shall be sufficient for the payment of the principal of, interest and redemption premium, if any, on such outstanding bonds which will not be immediately due and payable shall be deposited in trust, for the sole purpose of making such payments, with the treasurer of the State of West Virginia or the state sinking fund commission. Any of the moneys so deposited in trust may, prior to the date on which such moneys will be needed for the

payment of principal of, interest and redemption premium, if any, on such outstanding bonds, be invested and reinvested as determined by the board of regents, in whole or in part: (a) in direct obligations issued by the United States of America or one of its agencies or in direct obligations of the State of West Virginia, (b) in obligations unconditionally guaranteed by the United States of America as to principal and interest, or (c) in certificates of deposit of a banking corporation or association which is a member of the federal deposit insurance corporation, or successor; but any such certificates of deposit must be fully secured as to both principal and interest by pledged collateral consisting of direct obligations of or obligations guaranteed by the United States of America, or direct obligations of the State of West Virginia, having a market value, excluding accrued interest, at all times at least equal to the amount of the principal of and accrued interest on such certificates of

deposit. Any such investments must mature, or be payable in advance of maturity at the option of the holder, and must bear interest in such manner as to provide funds which, together with uninvested money, will be sufficient to pay when due or called for redemption the bonds refunded, together with interest accrued and to accrue thereon and redemption premiums, if any, and such refunding bonds proceeds or obligations so purchased therewith shall be deposited in escrow and held in trust for the payment and redemption of the bonds refunded: Provided, that if interest earned by any investment in such escrow is shown to be in excess of the amounts required from time to time for the payment of interest on and principal of the refunded bonds, including applicable redemption premium, then such excess may be withdrawn from escrow and disbursed in such manner as the board of regents shall by resolution determine, subject to the provisions of section two [§ 18-12B-2] of this

article. Any moneys in the sinking or reserve funds or other funds maintained for the outstanding bonds to be refunded may be applied in the same manner and for the same purpose as are the net proceeds of refunding bonds or may be deposited in the special fund or any reserve funds established for account of the refunding bonds.

The authority to issue revenue refunding bonds shall be in addition to any other authority to refund bonds conferred by law.

The board of regents shall have power to enter into such escrow agreements and to insert therein such protective and other covenants and provisions as it may consider necessary to permit the carrying out of the provisions of this article and to insure the prompt payment of principal of and interest and redemption premiums on the revenue bonds refunded.

Where any revenue bonds to be refunded are not to be surrendered for exchange or payment and are not to be paid at maturity

with escrowed obligations, but are to be paid from such source prior to maturity pursuant to call for redemption exercised under a right of redemption reserved in such revenue bonds, the board of regents shall, prior to the issuance of the refunding bonds, determine which redemption date or dates shall be used, call such revenue bonds for redemption and provide for the giving of the notice of redemption required by the proceedings authorizing such revenue bonds. Where such notice is to be given at a time subsequent to the issuance of the refunding bonds, the necessary notices may be deposited with the state sinking fund commission or the bank acting as escrow agent of the refunding bond proceeds and the escrow agent appropriately instructed and authorized to give the required notices at the prescribed time or times. If any officer of the public body signing any such notice shall no longer be in office at the time of the utilization of the notice, the notice shall nevertheless be

valid and effective for its intended purpose. (1977, c. 90.)

§ 18-12B-6. Bonds may be issued for combined purposes.

The board of regents may authorize by one or more resolutions a single issue of bonds for the combined purposes of refunding the outstanding bonds as herein authorized and financing one or more of the major renovations, repairs and safety upgrading and capital improvements herein authorized. (1977, c. 90.)

§ 18-12B-7. Bonds shall be negotiable instruments.

The revenue bonds, revenue refunding bonds and bonds issued for combined purposes under the provisions of this article shall, independently of the requirements of any other provision of law and solely by virtue of the provisions of this section, be and have all the qualities and incident of negotiable instruments. (1977, c. 90.)

§ 18-12B-8. Trust agreements for holders of bonds.

The board of regents may enter into an agreement or agreements with any trust company, or with any bank having the powers of a trust company, either within or outside the State, to act as trustee for the holders of bonds issued hereunder, setting forth therein such duties and containing such legally binding covenants of the board of regents with the holders of the bonds in respect to the payment of the bonds, the fixing, establishing and collecting of the fees hereinbefore referred to; the acquisition, construction, improvement, maintenance, operation, repair and insurance of authorized major renovations, repairs and safety upgrading and capital improvements; the custody, safeguarding and disposition of the proceeds of the bonds, and the moneys in such special funds, sinking funds, reserve funds, or any other moneys or funds, notwithstanding provisions of this article to the contrary; the security for

moneys on hand or on deposit, and the rights and remedies of the trustee and the holders of the bonds, as may be agreed upon with the purchasers of such bonds; provisions restricting the individual right of action of bondholders as is customary in trust agreements respecting bonds and debentures of municipal corporations, protecting and enforcing the rights and remedies of the trustee and the bondholders; and the provisions as to any other matters which are deemed necessary and advisable by the board of regents in the best interests of the State and to enhance the marketability of the bonds. Any such agreement entered into by the board of regents shall be binding in all respects on such board and its successors from time to time in accordance with the terms thereof; and all the provisions thereof shall be enforceable by appropriate proceedings at law or in equity, or otherwise. (1977, c. 90.)

§ 18.12B-9. Sinking fund for payment of bonds.

From the state system tuition fee special capital improvements fund the board of regents shall make periodic payments to the state sinking fund commission in an amount sufficient to meet the requirements of any issue of bonds sold under the provisions of this article, as may be specified in the resolution of the board authorizing the issue thereof and in any trust agreement entered into in connection therewith. The payments so made shall be placed by the commission in a special sinking fund which is hereby pledged to and charged with the payment of the principal of the bonds of such issue and the interest thereon, and to the redemption or repurchase of such bonds, such sinking fund to be a fund for all bonds of such issue without distinction or priority of one over another, except as may be provided in the resolution authorizing such issue of bonds. The moneys in the special sinking fund, less such reserve

for payment of principal and interest and redemption premiums, if any, as may be required by the resolution of the board of regents, authorizing the issue and any trust agreement made in connection therewith, may be used for the redemption of any of the outstanding bonds payable from such fund which by their terms are then redeemable, or for the purchase of bonds at the market price, but at not exceeding the price if any, at which such bonds shall in the same year be redeemable; and all bonds redeemed or purchased shall forthwith be canceled and shall not again be issued. (1977, c. 90.)

§ 18-12B-10. Credit of State not pledged.

No provisions of this article shall be construed to authorize the board of regents at any time or in any manner to pledge the credit or taxing power of the State, nor shall any of the obligations or debts created by the board under the authority herein granted be deemed to be obligations of the State. (1977, c. 90.)

§ 18-12B-11. Attorney general or his duly appointed legal representative to serve as bond counsel.

The attorney general, or his duly appointed legal representative, shall serve as bond counsel and shall be responsible for the issuance of a final approving opinion regarding the legality of the sale of bonds under this article. (1977, c. 90.)

§ 18-12B-12. Powers of board are supplemental; conflicting laws superseded.

The powers conferred by this article shall be in addition and supplemental to the existing powers of the board of regents. The provisions of any other law or laws conflicting with the provisions of this article shall be and the same are hereby superseded to the extent of any such conflict. (1977, c. 90.)

WEST VIRGINIA CODE § 18-11E-1 ET SEQ.

§ 18-11E-1. Definition of board; cost of construction, reconstructing, remodeling, repairing, improving, extending, equipping or furnishing the football stadium or other athletic facilities of Marshall University to be financed by revenue bonds or notes.

(a) Notwithstanding the provisions of section one [§ 18-1-1], article one of this chapter, the word "board," when used in this article means the West Virginia board of regents.

(b) For the purpose of financing the cost of any or all of the following: Constructing, reconstructing, remodeling, repairing, improving, extending, equipping or furnishing the football stadium or other athletic facilities of Marshall University, the board periodically may issue negotiable bonds or notes of the State in a principal amount, not in excess of fifteen million dollars, which, in the opinion of the board, shall be necessary to finance said cost. Such cost shall include, but not limited to, the

following: The cost of such construction, reconstruction, remodeling, repair, improvement, extension, equipment or furnishings; studies and surveys; plans, specifications, architectural and engineering services; legal, organizational, marketing or other special services; interest and carrying charges prior to, during and for six months after completion of such construction, reconstruction, remodeling, repair, improvements, extension, equipment or furnishing; the costs of issuing the bonds or notes; and a reasonable reserve for payment of the principal of and interest on the bonds or notes.

(c) The board periodically may issue renewal notes of the State, may issue revenue bonds of the State to pay notes and, if it considers refunding expedient may refund or refund in advance bonds issued by the board by the issuance of new bonds of the State, pursuant to the requirements of section six [§ 18-11E-6] of this article.

(d) Except as may otherwise be expressly provided by the board, every issue of bonds or notes by it shall be special obligations of the State, payable solely from the revenues or other moneys pledged therefor.

(e) The bonds and the notes shall be authorized by resolution of the board, shall bear such date and shall mature at such time or times, in the case of any such note or any renewals thereof not exceeding five years from the date of issue of such original note, and in the case of any such bond not exceeding forty years from the date of issue, as such resolution may provide. The bonds and notes shall bear interest at such rate or rates, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be payable in such medium of payment and at such place or places and be subject to such terms of redemption as the board may authorize. The bonds and notes may be sold by the board in the manner and at or not less than the price the board determines.

The bonds and notes shall be executed by the governor and the president of the board, both of whom may use facsimile signatures. The great seal of the State or a facsimile thereof shall be affixed thereto or printed thereon and attested, manually or by facsimile signature, by the secretary of state, and any coupons attached thereto shall bear the manual or facsimile signature of the president of the board. In case any officer whose signature, or a facsimile of whose signature, appears on any bonds, notes or coupons ceases to be such officer before delivery of such bonds or notes, such signature or facsimile is nevertheless sufficient for all purposes the same as if he had remained in office until such delivery; and, in case the seal of the State has been changed after a facsimile has been imprinted on such bonds or notes, such facsimile seal will continue to be sufficient for all purposes.

(f) A resolution authorizing bonds or notes or an issue of bonds or notes under this

article may contain provisions, which shall be a part of the contract with the holders of the bonds or notes, as to any or all of the following:

(1) With the written approval of the director of athletics at Marshall University, which approval shall be specific as to such moneys pledged, pledging and creating a lien on all or any portion of the moneys derived from admission fees to athletic contests at Marshall University to secure the payment of the bonds or notes or of any issue of bonds or notes, subject to those agreements with bondholders or noteholders which then exist;

(2) Pledging and creating a lien on any loan, grant or contribution to be received from the federal, state or local government or other source;

(3) Setting aside of reserves or sinking funds and the regulation and disposition thereof;

(4) Limitations on the purpose to which the proceeds of sale of bonds or notes may be

applied and pledging the proceeds to secure the payment of the bonds or notes or of any issue of the bonds or notes;

(5) Limitations on the issuance of additional bonds or notes and the terms upon which additional bonds or notes may be issued and secured;

(6) The procedure by which the terms of a contract with the bondholders or noteholders may be amended or abrogated, the amount of bonds or notes the holders of which must consent thereto and the manner in which the consent may be given; and

(7) Vesting in a trustee or trustees the property, rights, powers, remedies and duties which the board considers necessary or convenient.

(g) Prior to the preparation of definitive bonds or notes, the board may under like restrictions, issue temporary bonds or notes, with or without coupons, exchangeable for definitive bonds or notes, as the case may

be, upon the issuance of the latter. (1984, c. 66.)

§ 18-11E-2. Trustee for bondholders or noteholders; contents of trust agreement.

In the discretion of the board, any bonds, refunding bonds or notes issued by the board may be secured by a trust agreement between the board and a corporate trustee, which trustee may be any trust company or banking institution having the powers of a trust company within or without the State. Any such trust agreement may contain provisions as set forth in section one [§ 18-11E-1] of this article with respect to the resolution. All expenses incurred in carrying out such agreement may be treated as a part of the cost of constructing, reconstructing, remodeling, repairing, improving, extending, equipping or furnishing the football stadium or other athletic facility at Marshall University affected by such agreement. (1984, c. 66.)

§ 18-11E-3. Payment of principal of and premium, if any, and interest on bonds and notes from all or any portion of the moneys derived from admission fees to athletic contests at Marshall University; approval of director of athletics.

Whenever bonds or notes are issued for financing the cost of any or all of the following: Constructing, reconstructing, remodeling, repairing, improving, extending, equipping or furnishing the football stadium or other athletic facilities of Marshall University, the board may, with the written approval of the director of the athletics at Marshall University, pledge to the payment of the principal of and premium, if any, and interest on said bonds or notes all or any portion of the moneys derived from admission fees to athletic contests and deposited into the athletic accounts at Marshall University: Provided, that said approval of the director of athletics must specify all or any said portions of the moneys to be pledged: Provided, however, that no fees paid by

students other than the regular student activity fee may be so pledged. (1984, c. 66.)

§ 18-11E-4. Enforcement of payment and validity of bonds and notes.

(a) The provisions of this article and any resolution or trust agreement shall continue in effect until the principal of and interest on the bonds or notes of the State issued by the board have been fully paid, and the duties of the board under this article and any resolution or trust agreement shall be enforceable by any bondholder or noteholder by mandamus or other appropriate action in any court of competent jurisdiction.

(b) The resolution authorizing the bonds or notes shall provide that such bonds or notes shall contain a recital that they are issued pursuant to this article, which recital shall be conclusive evidence of their validity and of the regularity of their issuance. (1984, c. 66.)

§ 18-11E-5. Pledges; time; liens; recordation.

Any pledge made by the board shall be valid and binding from the time the pledge is made: Provided, that the pledge by the board of all or any portion of the moneys derived from admission fees to athletic contests and deposited into the athletic accounts at Marshall University shall be subject to the written approval of the director of athletics at Marshall University. The moneys so pledged and thereafter received by the board shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act. The lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the board irrespective of whether such parties have notice thereof. (1984, c. 66.)

§ 18-11E-6. Refunding bonds.

Any bonds issued under the provisions of this article and at any time outstanding may

at any time and from time to time be refunded by the board by the issuance of refunding bonds of the State in such amount as it may deem necessary to refund the principal of the bonds so to be refunded, together with any unpaid interest thereon; to provide additional funds for the purposes authorized by this article; and to pay any premiums and commissions necessary to be paid in connection therewith. Any such refunding may be effected whether the bonds to be refunded shall have then matured or shall thereafter mature, either by sale of the refunding bonds and the application of the proceeds thereof for the redemption of the bonds to be refunded thereby, or, together with the interest on such proceeds, for the payment of the bonds to be refunded thereby and the interest thereon as the same come due, or by exchange of the refunding bonds for the bonds to be refunded thereby: Provided, that the holders of any bonds to be refunded shall not be compelled without their consent to surrender their bonds

for payment or exchange prior to the date on which they are payable or, if they are called for redemption, prior to the date on which they are by their terms subject to redemption. Any refunding bonds issued under the authority of this section shall be payable from the revenues out of which the bonds to be refunded thereby were payable, from other moneys or from the principal of and interest on or other investment yield from investments or proceeds of bonds or other applicable funds and moneys, including investments of proceeds of any refunding bonds, and shall be subject to the provisions contained in and shall be secured in accordance with this article. (1984, c. 66.)

§ 18-11E-7. Purchase and cancellation of bonds or notes.

The board, subject to such agreements with bondholders or noteholders as may then exist, shall have the power, out of any funds available therefor, to purchase bonds, including refunding bonds or notes of the

State issued by the board. If the bonds or notes are then redeemable, the price of such purchase shall not exceed the redemption price then applicable plus accrued interest to the next interest payment date thereon. If the bonds or notes are not then redeemable, the price of such purchase shall not exceed the redemption price applicable on the first date after such purchase upon which the bonds or notes become subject to redemption plus accrued interest to such date. Upon such purchase, such bonds or notes shall be canceled. (1984, c. 66.)

§ 18-11E-8. Federal and private assistance.

The board is authorized and empowered to accept loans or grants or temporary advances for the purposes of paying part or all of the cost of constructing, reconstructing, remodeling, repairing, improving, extending, equipping or furnishing the football stadium or other athletic facilities of Marshall University and the other purposes herein authorized from the United States of America

or such federal or public agency or department of the United States or any private agency, corporation or individual, which loans or temporary advances may be repaid out of the proceeds of the bonds authorized to be issued under the provisions of this article, and to enter into the necessary contracts and agreements to carry out the purposes hereof with the United States of America or such federal or public agency or department of the United States or with any private agency, corporation or individual. (1984, c. 66.)

§ 18-11E-9. Vested rights; impairment.

The State pledges and agrees with the holders of any bonds or notes issued under this article that the State will not limit or alter the rights vested in the board to fulfill the terms of any agreements made with the holders thereof, or in any way impair the rights and remedies of the holders, until the bonds or notes, together with the interest thereon, and all costs and expenses in connection with any action or proceeding by or

on behalf of such holders, are fully met and discharged. The board is authorized to include its pledge and agreement of the State in any agreement with the holders of such bonds or notes. (1984, c. 66.)

§ 18-11E-10. Bonds and notes not debt of State, county, municipality or any political subdivision; expenses incurred pursuant to article.

Bonds, refunding bonds and notes issued under the authority of this article and any coupons in connection therewith shall not constitute a debt or a pledge of the faith and credit or taxing power of the State or of any county, municipality or any other political subdivision of the State, and the holders and owners thereof shall have no right to have taxes levied by the legislature or the taxing authority of any county, municipality or any other political subdivision of the State for the payment of the principal thereof or interest thereon, but such bonds and notes shall be payable solely from the revenues and funds pledged for their payment as authorized

by this article: Provided, that notes issued in anticipation of the issuance of bonds or bonds being refunded may be paid from the proceeds of bonds which are payable solely from revenues and funds pledged for their payment as authorized by this article. All such bonds and notes shall contain on the fact thereof a statement to the effect that the bonds or notes, as to both principal and interest, are not debts of the State or any county, municipality or political subdivision thereof, but are payable solely from revenues and funds pledged for their payment.

All expenses incurred in carrying out the provisions of this article shall be payable solely from funds provided under the authority of this article. This articles does not authorize the board to incur indebtedness or liability on behalf of or payable by the State or any county, municipality or any other political subdivision. (1984, c. 66.)

§ 18-11E-11. Negotiability of bonds and notes.

Other provisions of this Code to the contrary notwithstanding, the bonds or notes authorized to be issued by this article are negotiable instruments within the meaning of and for all purposes of the Uniform Commercial Code, subject only to the provisions of the bonds or notes for registration. (1984, c. 66.)

§ 18-11E-12. Bonds and notes legal investments.

The provisions of sections nine and ten [§§ 12-6-9 and 12-6-10], article six, chapter twelve of this Code to the contrary notwithstanding, the bonds and notes of the State issued by the board are securities in which all public officers and bodies of the State, including the West Virginia state board of investments, all municipalities and other political subdivisions of the State, all insurance companies and associations and other persons carrying on an insurance business, including domestic for life and domestic not

for life insurance companies, all banks, trust companies, societies for savings, building and loan associations, savings and loan associations, deposit guarantee associations and investment companies, all administrators, guardians, executors, trustees and other fiduciaries and all other persons whatsoever who are authorized to invest in bonds or other obligations of the state may properly and legally invest funds, including capital, in their control or belonging to them. (1984, c. 66.)

§ 18-11E-13. Exemption from taxation.

The exercise of the powers granted to the board by this article will be in all respects for the benefit of the students and the faculty and other employees at Marshall University and the other people of the State, for the improvement of their safety, convenience and welfare, and is a public purpose. As the operation and maintenance of the football stadium or other athletic facilities at Marshall University constitutes

the performance of essential governmental functions, the board shall not be required to pay any taxes or assessments upon any property acquired or used by the board or upon the income therefrom. Any bonds and notes of the State issued by the board, and all interest and income thereon, shall be exempt from all taxation by the State and any county, municipality, political subdivision or agency thereof, except inheritance taxes. (1984, c. 66.)

§ 18-11E-14. Article regarded as supplementary.

This article shall be deemed to provide an additional and alternative method for the doing of the things authorized hereby and shall be regarded as supplementary and additional to powers conferred by other laws. (1984, c. 66.)

§ 18-11E-15. Liberal construction.

This article, being necessary for the safety, convenience and welfare of the

students and the faculty and other employees at Marshall University and the other people of the State, shall be liberally construed to effectuate the purposes hereof. (1984, c. 66.)

B. OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HUGHES-BECHTOL, INC. *

CASE No. C-3-81-038

Plaintiff *

(Filed December 4, 1981)

vs. *

WEST VIRGINIA BOARD OF REGENTS *

Defendant *

DECISION AND ENTRY OVERRULING PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION; FINDINGS OF FACT AND CONCLUSIONS OF LAW; DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION TO DISMISS; JUDGMENT TO DEFENDANT; ENTRY OF JUDGMENT; PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND SEEKING STATEMENT OF COURT'S DISINCLINATION TO SUSTAIN DEFENDANT'S MOTION TO DISMISS DEEMED MOOT; TERMINATION ENTRY

I. Introduction

On February 9, 1981, Hughes-Bechtol, Inc., filed the within action against the West Virginia Board of Regents (hereinafter Board), requesting that the Court both declare the arbitration clause in a contract between the Plaintiff and Defendant to be binding on the parties, and that it award damages in the

amount established by the arbitrator. The facts before this Court indicate that on April 5, 1979, Hughes-Bechtol and the Board entered into a standard American Institute of Architects (AIA) agreement, which provided that Hughes-Bechtol would perform mechanical work on the Multi-Purpose Physical Education Facility (gymnasium) to be constructed at Marshall University in Huntington, West Virginia. The contract between the parties also provided for arbitration in the event of contractual disputes. Problems arose during construction, and Hughes-Bechtol requested arbitration. The Board refused to participate in arbitration proceedings, claiming that the arbitration clause was of no effect, since the Board had no authority to obligate the State of West Virginia for amounts beyond those which had been appropriated by the state legislature. Moreover, since the Board was immune from suit under principles of sovereign immunity, the Board contended that

Hughes-Bechtol's only, and proper remedy lay in the West Virginia Court of Claims, where suits against the state were allowed to be brought. Hughes-Bechtol proceeded through arbitration anyway, and just prior to the granting of the arbitration award, filed the present action. The Board then filed a Motion to Dismiss, requesting that the suit be dismissed, inter alia, for the aforementioned reasons. However, before the Court issued a ruling on Defendant's Motion to Dismiss, Hughes-Bechtol filed a Motion for a Preliminary Injunction on August 4, 1981, requesting that the Court enjoin the Board from interfering with its (Hughes-Bechtol's) contractual rights, and from its performing the work left unfinished under the contract entered into by the parties. Appropriate Opposing and Reply Memoranda were filed by the parties, and on August 11, 1981, Plaintiff's Motion for a Preliminary Injunction came on for hearing before the Court, at which time the Court

received testimony on behalf of the Plaintiff, from Philip Thompson, the Regional Director of the Cincinnati Office of the American Arbitration Association, and from D. R. Hughes, Jr., the President of Hughes-Bechtol, Inc. Plaintiff also offered nine exhibits, which were admitted into evidence. Defendant offered testimony from Karl Egnatoff, the Vice-President of Administration for Marshall University, and from Kenneth E. Grose, the Vice-Chancellor for Administrative Affairs for the West Virginia Board of Regents. Defendant additionally has filed with the Court, in conjunction with its Motion to Dismiss, the Affidavit of Dr. Robert Ramsey, Jr., the Chancellor and Chief Administrative Officer for the West Virginia Board of Regents, to which is attached the purchase order issued to Hughes-Bechtol by the Commissioner of Finance and Administration for the West Virginia Board of Regents.

After consideration of the above materials, the Court indicated to the parties on August

13, 1981, that it would overrule the Plaintiff's Motion for a Preliminary Injunction, and would thereafter file a decision more fully outlining its reasoning. The Court also stated that a decision would be forthcoming at the same time with regard to the Motion to Dismiss previously filed by the Defendant. After an analysis of the facts and legal authority pertinent to the matters under consideration, the Court has concluded that: (1) Under the balancing test followed by the Sixth Circuit in Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978), cert. dism'd., 442 U.S. 925 (1979)(Roth), for ruling upon a motion for preliminary injunction, the Plaintiff has not demonstrated either a likelihood of success on the merits, or that it will suffer irreparable harm; (2) Defendant's Motion to Dismiss should be granted, since the Court does not have jurisdiction over the subject matter involved in this action. Because Fed. R. Civ. P. 52(a) requires specific findings of fact and

conclusions of law by the Court upon refusal of interlocutory injunctions, the Court will first set forth its determinations with respect to the injunction request, and will then follow with an analysis of the other matters brought forth in the Defendant's motion to dismiss.

II. Preliminary Injunction

A. Findings of Fact

Based on the testimony adduced at the hearing held on August 11, 1981, and the Exhibits, affidavit, and the pleadings presented herein, the Court makes the following findings of fact:

1. Hughes-Bechtol, Inc. (also "contractor") is a corporation organized under the laws of the State of Ohio, with a principal place of business in Ohio, and an annual volume of business of approximately thirty-million dollars ($30,000,000).

2. Marshall University is a state university located in Huntington, West Virginia. Marshall

University has an enrollment of approximately twelve thousand students, and participates in Division I athletics.

3. In 1979, the West Virginia Board of Regents (also "owner") solicited bids in connection with the construction at Marshall University of Henderson Center, which was intended to be a multipurpose physical education facility including a basketball arena seating ten thousand persons, classrooms for the department of health and physical education, and offices for the athletic department. Also included in this project was the renovation of an existing building, Gullickson Hall.

4. Hughes-Bechtol was awarded a contract in the amount of three million, one hundred sixty two thousand, one hundred and seventy-three dollars ($3,162,173.00) for the mechanical work for the Multi-Purpose Physical Education Facility. According to the terms of the contract, the work to be performed was to be commenced upon the date specified in the

"Notice to Proceed" given by the Board to Hughes-Bechtol. From the time specified, Hughes-Bechtol would have eight hundred and fifty (850) consecutive calendar days to fully complete the project.

5. On April 5, 1979, a purchase order was issued by the State of West Virginia, Department of Finance and Administration for the above contract price.

6. The original anticipated completion date for the Henderson Center Project was April 6, 1981, but at the time of the injunction hearing, the physical activities center was scheduled for occupancy on October 15, 1981, due to delays in the project. At the time of the hearing herein, the project was ninety percent (90%) finished.

7. During the first year of the contract, little progress was made on the construction project. Hughes-Bechtol requested an extension of time and payments for the increased costs due to the delay, but the Board refused,

and instead directed that Hughes-Bechtol perform the unfinished work in the time remaining under the contract.

8. Paragraph 7.9.1 of the contract between the Board and Hughes-Bechtol provided that all disputes arising between the owner and the contractor would "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association," that the agreement to arbitrate "shall be specifically enforceable under the prevailing arbitration law," and that "the award entered by the arbitrators shall be final; and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

9. On December 11, 1980, Hughes-Bechtol filed a demand for arbitration with the Cincinnati office of the American Arbitration Association. The arbitration inquiry was bifurcated, with consideration being first given to whether the issue was one subject to

arbitration. On February 20, 1981, the arbitrator ruled that the matter was arbitrable, and notified the parties of his decision. A hearing on the claims of Hughes-Bechtol was held, and on June 9, 1981, after the filing of the within lawsuit, the arbitrator issued his decision, finding that Hughes-Bechtol was entitled to an additional sum of five hundred twenty-one thousand three hundred twenty-six dollars and forty-eight cents ($521,326.48).

10. The Board did not participate directly in the arbitration hearings, but did have a legal representative present. On various occasions, the Board and the West Virginia Attorney General's Office advised Hughes-Bechtol and the American Arbitration Association that the Board of Regents was not authorized to engage in binding arbitration.

11. Paragraph 9.7 of the contract provided that if an amount awarded through arbitration was not paid by the owner, the contractor was permitted to stop work. After the Board

refused payment of the arbitration award, Hughes-Bechtol removed its work forces from the Henderson Center construction site on July 20, 1981.

12. The other contractors on the Henderson Center project have agreed to pursue remedies for contractual claims against the Board in the West Virginia Court of Claims.

13. Vandalism at the University is minimal. The only incidents testified to involved minor tampering with fire equipment in the dormitories on two occasions. In addition, Henderson Center was evacuated once due to a bomb scare. Bomb scares, however, occur with some frequency at the University, because of the erroneous belief by students that such a scare will result in the cancellation of classes.

14. The Board and Hughes-Bechtol continued to attempt to negotiate, but on August 3, or 4, 1981, Hughes-Bechtol was advised that it would not be possible for Marshall University to pay seven or eight hundred thousand dollars

in additional claims on the Henderson Center project.

15. On Tuesday, August 4, 1981, Hughes-Bechtol removed approximately two hundred thousand dollars ($200,000.00) worth of equipment from the Henderson Center job site, and from warehouses in Huntington, West Virginia. Between July 20, 1981, and the date of the equipment removal, Hughes-Bechtol had employed a project manager on the job site. Although the equipment had been at the job site or in warehouses for at least one year, Hughes-Bechtol was concerned about the safety of the equipment, based on the bomb scares at the job site and the possibility of vandalism at both the job site and the warehouses. Hiring a twenty-four guard for the property may have been less expensive than moving the equipment to Dayton. Hughes-Bechtol did not attempt to find other warehouses in the Huntington area to accommodate the property.

16. Hughes-Bechtol's sole claimed damage

justifying a preliminary injunction is that, on future bids, it will be required to disclose on the bidding qualification statement that it had failed to finish work awarded to it. This would preclude Hughes-Bechtol from being considered for a bid by some employers. The bidding qualification statement also provides for an explanation of why the work awarded was not finished.

17. If a preliminary injunction should be granted, the University would be unable to start its basketball season and intramural programs as scheduled. Approximately five thousand tickets have already been sold for the first game of the season. In addition, an injunction would have an effect on the academic program of the University. Since the new facility is constructed so as to "wrap around" an existing structure, classrooms already in existence will be unavailable because of poor ventilation. Finally, an injunction would cause the loss of the jobs of the approximately

one hundred and thirty other construction employees presently working at the Henderson Center site.

18. Payments for the Henderson Center project come from the State treasury of West Virginia. The project was financed by a public bond sale, with student revenues for future years obligated to pay for the project. All funds expended by the Board of Regents are state funds from the state treasury and may only be spent pursuant to an appropriation by the West Virginia legislature. All funds received by the Board from all other sources such as federal funds or gifts must be deposited in the state treasury and may be expended only for their specified purposes, and after appropriation by the West Virginia legislature.

19. If Hughes-Bechtol does not complete its contractual obligations, the Board intends to secure other contractors to perform the work.

20. The State of West Virginia has authorized suit to be brought against the State in the West Virginia Court of Claims.

B. Conclusions of Law

In Roth, 583 F.2d 527 (6th Cir. 1978), cert. dism'd., 442 U.S. 925 (1979), the Sixth Circuit indicated that the following approach should be utilized in determining whether injunction relief should be granted:

> In addition to assessing the likelihood of success on the merits, the Court must consider the irreparability of any harm to the plaintiff, the balance of injury as between the parties, and the impact of the ruling on the public interest.

Id. at 537-538, quoting with approval from, Metropolitan Detroit Plumbing & Mechanical Contractors Ass'n. vs. H.E.W., 418 F.Supp. 585, 586 (E.D. Mich. 1976) (Detroit Plumbing v. H.E.W.). While there has been an ostensible conflict in the Sixth Circuit's interpretation of precisely what degree of likelihood of success is required, compare: Ohio v. Callaway, 497 F.2d 1235, 1240 (6th Cir. 1974)

(requiring possibility of success on the merits), with Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261, n.4 (6th Cir. 1977)(requiring strong or substantial likelihood or probability of success on the merits), the Roth Court approved the following explanation, again quoting Detroit Plumbing v. H.E.W., 418 F. Supp. 585, 586 (E.D. Mich. 1976):

> This apparent disparity in the wording of the standard merely reflects the circumstance that no single factor is determinative as to the appropriateness of equitable relief . . . In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction . . . [i.e., the greater the potential harm to the plaintiff, absent an injunction, the less likelihood of success on the merits which need be shown, and vice-versa). It thus appears that the precise wording of the standard for the likelihood of success on the merits is not as important as a realistic appraisal of all the traditional factors weighed by a Court of equity. A balancing is required, and not the mechanical application of a certain form of words.

Roth, 583 F.2d at 537-538. (Bracketed material added).

Balancing the above factors then, as required, this Court finds that injunctive relief is not appropriate under the circumstances involved herein. First, there appears to be slight likelihood that Plaintiff will be able to prevail on the merits in this Court. In reaching such a determination, the Court has carefully avoided any prediction with regard to the eventual outcome of the controversy between Hughes-Bechtol and the Board, but instead has premised its decision on the fact that this Court has no jurisdiction over the subject matter of the present dispute. Consequently, Plaintiff will never be able to succeed in obtaining a judgment on the merits in this jurisdiction. Second, assuming that Plaintiff could somehow "prevail" herein, it has not demonstrated that it will sustain irreparable harm without the issuance of an injunction. Although Plaintiff has indicated that it will be harmed in its ability to bid on future construction contracts if it does

not finish the Marshall University contract, an examination of the bidding qualification statement relied upon by Plaintiff indicates that an opportunity is provided thereon for an explanation of the circumstances surrounding any failure to complete a contract. Thus, should Plaintiff eventually receive an award from the West Virginia Court of Claims, which would vindicate its refusal to complete the contract, that fact alone should provide ample justification for future employers. Therefore, Plaintiff does have an adequate remedy at law. Moreover, even at the present incomplete stage of the proceedings, Hughes-Bechtol does have a favorable arbitral decision which may be used an an explanation for the work stoppage at Marshall University, or for a refusal to finish the contract.

Third, the balance of injury in the event of issuance of an injunction, clearly rests with the Board rather than with Hughes-Bechtol. Since the Board is charged by law

with the supervision and management of the educational policies and affairs of the universities of West Virginia, W. Va. Code §18-26-1 (1969), an interference with the intramural, athletic, and educational programs at Marshall University would negatively affect the Board's ability to perform its legislatively-mandated functions. Finally, assuming arguendo that all the above considerations militated in favor of Hughes-Bechtol, the impact of a ruling permitting an injunction would adversely serve the public interest of the people of West Virginia, who would be deprived indefinitely of their ability to utilize the Henderson Center Facility, and would be subjected to a disruption in educational opportunities.

Therefore, based on the foregoing analysis, the Court makes the following conclusions of law:

1. Plaintiff has little or no likelihood of succeeding on the merits in the present action;

2. Plaintiff has not demonstrated that it does not have an adequate remedy at law, or that it would suffer irreparable harm absent an injunction;

3. The balance of harm in the event of an injunction is in favor of the Board of Regents rather than Plaintiff;

4. Plaintiff has not established that the issuance of a preliminary order restraining construction at Henderson Center, or enjoining Defendant from employing another mechanical contractor, will not injure the public interest.

Accordingly, Plaintiff's request for a preliminary injunction must be, in all respects, denied.

III. Motion to Dismiss.

As was previously indicated, Defendant filed a Motion to Dismiss on April 2, 1981, requesting that the within action be dismissed under Fed. R. of Civ. P. 12(b)(1), (2), (3), (5), (6), and (7). While Defendant has raised several grounds for dismissal such as insufficiency of process, failure to join an indispensable party, sovereign immunity, and

lack of subject matter jurisdiction, only two grounds for Defendant's Motion need be addressed, as those matters provide more than ample justification for dismissing this action. Therefore, the Court will discuss only those issues contained in branches I and II of Defendant's Motion to Dismiss, that is, those matters pertinent to subject matter jurisdiction and sovereign immunity. For procedural clarity, this Court will first consider the jurisdictional questions presented in Branch II of Defendant's Motion. With these points in mind, the Court now turns to an analysis of: (1) whether diversity jurisdiction exists between the Plaintiff and Defendant, and if not, whether an alternate source of federal jurisdiction is present; and (2) whether in any event, suit against the Board of Regents is prohibited under the doctrine of sovereign immunity.

A. Jurisdiction

1. Diversity of Citizenship

The complaint filed in this action states that the Plaintiff, Hughes-Bechtol, Inc., is a corporation organized under the laws of Ohio, that the Defendant, the West Virginia Board of Regents, is a citizen of the State of West Virginia, that the amount in controversy exceeds ten thousand dollars, and that jurisdiction exists pursuant to 28 U.S.C. §1332 (1970). §1332 provides that:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -- (1) citizens of different states.

Although the parties herein are technically "residents" of different states and would thus seem to satisfy diversity requirements, Defendant has maintained that the Board is merely the arm, or alter ego, of the State of West Virginia and cannot therefore be considered a citizen for diversity purposes. Plaintiff has replied to this contention by pointing out that under West Virginia law, the

Board is a corporation, and was subjected to diversity jurisdiction in Kondos v. West Virginia Board of Regents, 318 F. Supp. 394 (S.D. W.Va. 1970), aff'd, 441 F.2d 1172 (4th Cir. 1972) (Kondos).

The principle is well settled that a state may not be considered a citizen in order to establish diversity jurisdiction. In Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894) (Postal Telegraph), the State of Alabama had initiated suit in an Alabama state court against a New York corporation in order to recover taxes owed to the State. Id. at 482, 483. The Defendant removed the case to federal court, but the Supreme Court ruled that removal was improper, since neither diversity nor federal jurisdiction was present. Id. at 487. With respect to diversity, the Court stated that:

> A state is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a

> citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it unless it arises under the Construction, laws or treaties of the United States.

Id. (citations omitted).

In State Highway Comm'n of Wyoming v. Utah Constr. Co., 278 U.S. 194 (1929) (Wyoming Highway Comm'n), a Utah citizen filed a breach of contract action against the Wyoming State Highway Commission in a Wyoming district court, alleging jurisdiction on the basis of diversity of citizenship. Id. at 198. Although the State of Wyoming had not been named as a party to the action, the Court held that since the suit was in effect against the State, diversity of citizenship could not exist. Id. at 199-200. The Court appeared to premise its determination that the State was the real party in interest on the following factors: (1) the highway commission was merely an arm or alter ego of the state, "with no funds or ability to

respond in damages," id. at 199; and (2) neither the Highway Commission nor its members had assumed any direct or personal responsibility by entering into the contract in question. Id. Significantly, the Court found it unnecessary to consider the effect of the State's grant to the Highway Commission of the power to sue or be sued, or its later withdrawal of that power. Id. The Court indicated that since the State was not considered to be a citizen for purposes of diversity, "[N]o consent by the State to submit itself to suit could affect the question of diverse citizenship." Id. at 199-200. Thus, even should a state consent to suit in federal court, that act itself cannot create diversity jurisdiction.

Like the Highway Commission in the previously cited case, the Board of Regents is a statutorily-created creature. W. Va. Code §18-26-1 (1969) specifically provides that:

> The purpose of the legislature in the enactment of this article is to establish a state agency to be known as the West Virginia Board of Regents which will have the general determination, control, supervision and management of the financial, business and educational policies and affairs of all State Colleges and Universities.

(emphasis added). Moreover, an examination of West Virginia law reveals that the board has no funds or ability to respond in damages but is merely a conduit through which budget requests from the state universities, and corresponding appropriations from the West Virginia legislature, flow. For example, W. Va. Code §18-26-8 (1981) lists certain duties of the Board, which involve, inter alia,: (1) directing the preparation of budget requests for state universities; (2) the submission of budget requests and analysis of requests to the legislature; (3) compilation of an annual report indicating the fiscal performance of the state system of higher education. Although some of these duties were more specifically delineated by the amendment of §18-26-8 in 1981, the essential

nature of the Board's function has not changed from former practice. See former W. Va. Code §18-26-8 (1969).

Plaintiff has indicated, in a memorandum filed after the injunction hearing (Doc. #20), that the source of a state agency's funds is often determinative of that agency's entitlement to immunity from suit. Plaintiff argues therefore that since the project in question was financed by a self-liquidating bond issue secured by student tuition fees, rather than by general state revenues, the Board may not claim immunity as an arm of the State. The case cited by Plaintiff, Hope Natural Gas Co. v. West Vir. Turnpike Comm'n, 143 W. Va. 913, 105 S.E. 2d 630 (1958) (Hope Natural Gas), considered whether the West Virginia Turnpike Commission was immune from suit as the alter ego of the State of West Virginia. Id. at 926, 105 S.E. 2d 638. The Court analyzed the statutory provisions creating the Commission, which was authorized to collect tolls without

supervision by other State agencies, id. at 919, 105 S.E.2d 634; was permitted to construct projects and to issue revenue bonds payable solely from commission revenues, id. at 918, 105 S.E. 2d 633; and was required under §15 of its enabling statute to pay compensation from Commission funds for all damages caused to private property. Id. at 920-921, 930, 105 S.E. 2d 634, 639. The Court noted that previous state and federal decisions had denied immunity to the Commission, id., and further found that in any event, §15 operated as a waiver of the Commission's immunity. Id. at 930, 105 S.E. 2d 639-640. While the Court did place emphasis on the factor of an agency's independent financial existence, even where that agency performed a governmental function, id. at 924-925, 105 S.E. 2d 636-637, the Court also stated that:

> In determining whether a commission or other body or entity created by

> the state is in truth and effect a part of the state, all of the features or characteristics must be considered and consequently each case must rest upon the provisions of the entity's own creation.

Id. at 928-929, 105 S.E.2d 639.

The case upon which Plaintiff has relied, however, is not controlling upon this action, due to the subsequent decision of the same court in City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E. 2d 298 (1969) (Morgantown). In Morgantown, West Virginia's highest court considered whether to issue a writ of mandamus requiring the West Virginia Court of Claims to assume jurisdiction of an action for the collection of fire protection fees, brought against the Board of Governors of West Virginia University. Id. at 122, 168 S.E. 2d 299-300. The Court determined that the Board was a state agency, and an arm of the State, and ordered that the writ be issued. Id. at 131-132, 168 S.E. 2d 304. In so ruling, the Court distinguished Hope Natural Gas as follows:

> The rights and powers conferred and the duties imposed by the respective statutes upon the board of Governors of West Virginia University and the West Virginia Turnpike Commission differ materially and in many respects, particularly with reference to funds and moneys used and administered by the board and by the commission. The moneys accepted and received by the board of governors and on which it depends for its financial support are paid into the State treasury, whereas the moneys accepted and received by the commission are not required to be deposited in the State treasury but are administered under the supervision of the commission.

Id. at 131, 168 S.E. 2d 304 .

After the Morgantown decision, the West Virginia legislature amended the West Virginia Code to create the West Virginia Board of Regents, which was vested with the powers previously held by the board of governors of West Virginia University, W.Va. Code §18-26-11 (1969), and those formerly held by the West Virginia Board of Education, W.Va. Code §18-26-12 (1969). In 1972, after these amendments were adopted, the West Virginia Supreme Court, citing Morgantown, ruled that the West Virginia

Board of Regents, as an arm of the state of West Virginia, had the authority to acquire land by condemnation without special legislative authority. West Virginia Board of Regents v. Fairmont, Morgantown, and Pittsburgh R.R. Co., 155 W.Va. 863, 866-867, 189 S.E.2d 40, 43 (1972) (emphasis added). These decisions indicate that, in the opinion of West Virginia's highest state court, the Board of Regents is an arm, or alter ego, of the State of West Virginia.

As a final matter, this Court notes that in Kondos, 318 F. Supp. 394 (S.D. W.Va. 1970), aff'd 441 F.2d 1172 (4th Cir. 1972), a West Virginia district court conducted a thorough survey of the applicable West Virginia Supreme Court decisions, many of which have been cited herein, and concluded that the West Virginia Board of Regents, as an arm of the State of West Virginia, was immune from suit under the doctrine of sovereign immunity. Id. at 396-397. That decision was upheld on appeal by the

Fourth Circuit as "proper for the reasons stated by the District Judge." 441 F.2d at 1172. Plaintiff has, however, attempted to distinguish the Kondos decision on several grounds, none of which are legally correct. For example, Plaintiff has contended that diversity jurisdiction was permitted in Kondos, and should therefore be found to exist herein by this Court. (Doc. #10, p. 2). While Kondos was filed as a diversity action, 318 F. Supp. at 396, that does not mean that the requirements for diversity jurisdiction were found to be satisfied therein; the Kondos Court merely dismissed the action against the Board on the alternative ground of sovereign immunity. In this context, it must be emphasized that a resolution of either issue requires a threshold determination of whether the agency in question is but an alter ego, or arm of the State. Id.; Postal Telegraph, 155 U.S. 482 (1894); Wyoming Highway Comm'n, 278 U.S. 194, 199-200 (1929). Thus, the Kondos case cannot

be viewed as supporting a finding that diversity jurisdiction is present herein, since the same considerations involved in the dismissal therein due to sovereign immunity lead this Court to conclude that the Board of Regents, as an arm or alter ego of the State, cannot be considered a citizen for diversity purposes.

The preceding discussion has illustrated that the highest courts of West Virginia, both federal and state, have spoken unequivocaly and affirmatively on the issue of whether the Board of Regents is an arm of the state. Accordingly, this Court need inquire no further, beyond commenting, in response to Plaintiff's "funding source" argument, that the material distinction noted in Morgantown, 153 W.Va. 121, 168 S.E. 2d 298 (1969), of payment of funds into the State treasury, id. at 131, 168 S.E. 2d 304, still exists herein, whether the Henderson Center project was financed by a bond issue secured by student tuition fees, or by general state revenues. In either event,

tuition fees and other funds collected by the University are required to be deposited into the State treasury. In this context, see: W. Va. Code §18-24-1 (1981) (authorizing the Board to fix tuition and fees for state universities); §§18-23-5, 18-23-7 (1969) (requiring that all money belonging to the state, and coming into the hands of the governing boards of state universities be transmitted into the state treasury, with expenditure therefrom permitted only upon submission of requisitions by the governing boards, and appropriation by the state legislature).

Plaintiff has repeatedly asserted that the inquiry into the Board's status and conduct is a "fact-specific" one (Doc. #8, p. 9; Doc. #20, p. 2), and that therefore, at the present stage of the proceedings, the matters under consideration by the Court are not ripe for determination.[1] Initially, the Court notes that summary judgment is not required herein because reference to the complaint and

the previously cited case law, of which the Court can take judicial notice, obviates the need for factual determinations. Moreover, even assuming the application herein of Hope Natural Gas, 143 W.Va. 913, 105 S.E.2d 630 (1958), the inquiry required by that case is not factual, but is one into the legislative provisions which have created the agency in question. Id. at 928-929, 105 S.E.2d 639. Because an analysis of the statutes creating the Board has been conducted herein (although not strictly necessary in view of the dispositive rulings of the West Virginia courts), and has revealed that the Board is an arm of the State of West Virginia, this Court can find no further barriers to concluding that the Board of Regents may not be considered a citizen for the purpose of invoking diversity jurisdiction. Having determined then, that jurisdiction

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[1]Footnote located at end of opinion.

herein may not be premised upon diversity of citizenship, the Court will next consider what alternate jurisdictional grounds, if any, may be present.

2. Other Jurisdictional Grounds

Although diversity jurisdiction does not exist herein, Postal Telegraph, 155 U.S. 482 (1894), would still permit this Court to assume jurisdiction over the present action if an alternate basis of jurisdiction, such as federal question jurisdiction, exists. Id. at 487. Although the complaint herein alleges that a federal question has arisen under the Eleventh Amendment, the sole Eleventh Amendment issue which has been presented is whether the Plaintiff's claim against the Board is barred under the doctrine of sovereign immunity. This issue is merely an anticipation of a defense and does not constitute an element of Plaintiff's claim, which is for a declaratory judgment and for the enforcement of an arbitration decision. As such, the Eleventh

Amendment issue does not invoke this Court's federal question jurisdiction in light of the Supreme Court's ruling in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974), wherein the Court stated that:

> This Court has repeatedly held that, in order for a claim to arise "under the Constitution, laws, or treaties of the United States," "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the Plaintiff's cause of action." . . . The federal questions "must be disclosed upon the face of the complaint, unaided by the answer." Moreover, "the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense."

Id. at 127-128. (citations omitted). Consequently, as Plaintiff's assertion of an Eleventh Amendment issue does nothing more than anticipate the sovereign immunity defense which has in fact been raised by Defendant, no federal question jurisdiction has been invoked by the inclusion of that issue in Plaintiff's complaint. In addition, although Plaintiff's

complaint requests a Declaratory Judgment, under 28 U.S.C. §2201 (1958) and Fed. R. Civ. P. 57, of the legal relations between the parties, the Declaratory Judgment Act does not extend the jurisdiction of the federal courts, but is a procedural remedy which can only be afforded where another basis of jurisdiction already exists. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 666, 671 (1950).

Finally while the potential application herein of the United States Arbitration Act, 9 U.S.C. §§1 et seq. (1970) has not been raised by Plaintiff's Complaint, the relevance of that Act has been discussed by both parties in various memoranda submitted to the Court. Therefore, the Court will assume that Plaintiff would, if offered an opportunity, amend its Complaint to allege the application of the United States Arbitration Act. In addition, the Court assumes, for purposes of ruling on this motion, that the contract herein involved interstate commerce, as the Act only extends

to such contracts. 9 U.S.C. §§1, 2 (1970).

As was previously noted herein, in order for federal question jurisdiction to be present, the right or immunity involved must be created by the Constitution or laws of the United States, and must be an essential element of the Plaintiff's claim. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-128 (1974). Assuming arguendo that Plaintiff would allege the application of the Arbitration Act, the Complaint herein would be brought pursuant to 9 U.S.C. §4 (1970), which provides that upon a party's failure to arbitrate under a written arbitration agreement, the aggrieved party may petition a district court for an order directing that arbitration proceed. Although the Act would be an essential element of a plaintiff's claim, and is clearly a federal law, the Courts, by looking to the wording of the Act itself, have consistently held that the United States Arbitration Act does not, in and of itself,

operate to invoke the jurisdiction of the federal courts. Litton FCS, Inc. v. Pennsylvania Turnpike Comm'n, 396 F. Supp. 579, 585 (E.D. Pa. 1974), aff'd mem. Litton Business Systems, Inc. v. Pennsylvania Turnpike Comm'n, 511 F.2d 1394 (3rd Cir. 1975) (Litton) (citations omitted). One of the first major decisions in this area was Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2nd Cir. 1959), cert. granted 362 U.S. 909 (1960), petition for cert. dism'd per stipulation, 364 U.S. 801 (1961) (Robert Lawrence). In that case, the Court noted that while new substantive federal rights were created by the Arbitration Act, suits involving the Act did not provide an independent basis of federal jurisdiction. Id. at 408 (citations omitted). In so holding, the Court specifically pointed to §§3, 4, and 8 of the Act, which appeared to require a jurisdictional basis other than the Arbitration Act for actions brought in federal courts. Id.

This view has been followed in other jurisdictions. Commercial Metals Co. v. Balfour, Guthrie and Co., LTD., 577 F. 2d 264, 268-269 (5th Cir. 1978); Collins Radio Co. v. Ex-Cello Corp., 467 F. 2d 995, 996, n. 1 (8th Cir. 1972); Monte v. Southern Delaware County Authority, 321 F. 2d 870 (3rd Cir. 1963); Sear v. Cadillac Automobile Co., 501 F. Supp. 1350, 1358 (D. Mass. 1980); Litton, 376 F. Supp. 579, 585 (E.D. Pa. 1974), aff'd mem. 511 F.2d 1394 (3rd Cir. 1975).[2]

In American Airlines, Inc. v. Louisville and Jefferson County Air Board, 269 F.2d 811 (6th Cir. 1959) (American Airlines), the Sixth Circuit rendered a decision which appears to comport with the generally accepted view of the intended role of the Arbitration Act. In American Airlines, since jurisdiction was premised upon diversity, id. at 822, the Court had no need to directly address that issue.

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[2]Footnote located at end of opinion.

The Court did consider, inter alia, whether Kentucky law or federal law would govern the validity and enforceability of an arbitration clause contained in leases entered into by several airlines and the Louisville and Jefferson County Air Board. Id. at 814-815. The Court discussed the Arbitration Act, and stated that:

> Consideration of the legislative history reveals that what the Congress intended was merely to overrule by legislation long-standing judicial precedent, which declared agreements to submit judiciable controversies to arbitration contrary to public policy, on the ground that enforcement of such agreements would oust the courts of their jurisdiction. Thus, the congressional purpose was to make arbitration agreements within the scope of the Federal statute as effective [sic] enforceable as any other contract, and so permit contracting parties thereby to avoid, if they chose so to do, the "delay and expense of litigation."

Id. at 816. (citations omitted) (emphasis added). The Court also noted that the legislative history of the Act indicated that "'an arbitration agreement is placed upon the

same footing as other contracts.'" Id. (citation omitted). Although the Court did not discuss the jurisdictional aspects of the Arbitration Act, the above-quoted language indicates the Court's awareness that the Act did nothing more than eliminate established judicial reluctance to enforce arbitration clauses in contracts. Since federal jurisdiction is unquestionably not present in an ordinary contract case, even one involving interstate commerce, unless the parties are of diverse citizenship, the Sixth Circuit appears to at least implicitly support those decisions which have held that the United States Arbitration Act contemplates a source of federal jurisdiction other than itself in actions involving the Act. As a final point pertinent to analysis, this Court notes that a thorough analysis of the case law pertinent herein has not disclosed any Sixth Circuit decisions wherein the Arbitration Act constitutes the sole basis of jurisdiction. Therefore, having

concluded that Local 19, as discussed in Footnote 2, supra, does not dictate the decision herein, and that later Sixth Circuit authority indicates a contrary intent to that expressed in Local 19, this Court will now briefly explain its reasons for agreeing with the weight of authority that in actions involving the United States Arbitration Act, an independent ground of federal jurisdiction is required.

The starting point for inquiry must be the Act itself, which the Supreme Court has indicated should be read as a whole. Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 201 (1956)(Bernhardt). 9 U.C.S. §1 (1970) defines commerce as used in the Arbitration Act; §2 provides that agreements to arbitrate in contracts involving commerce shall be valid and enforceable, and the remaining provisions of the Act in general provide for certain procedures to be followed where parties have agreed to arbitrate, but fail to do so, or

where an award has been made, and is required to be confirmed. As noted in Robert Lawrence, 271 F.2d 402 (2nd Cir. 1959), cert. granted, 362 U.S. 909 (1960), petition for cert. dism'd per stipulation, 364 U.S. 801 (1961), certain sections of the Act specifically contemplate a jurisdictional basis other than the Arbitration Act itself. Id. at 408. In particular, §4 provides that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

(emphasis added). Likewise, §8 gives the Court jurisdiction to deal with maritime cases, "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty." (Emphasis added). These clear jurisdictional limitations comport with the

legislative history of the Act, which is devoid of any interference that contracts containing arbitration clauses were intended to invoke federal jurisdiction where a contract without such a clause could not. Representative Graham, who authored the report accompanying the arbitration bill submitted to the House of Representatives, H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924), emphasized during debate on the bill in the House, that the bill "does not involve any new principle of law . . . creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham). In addition, H.R. Rep. No. 96 stated that the Act was intended to alter the common law doctrine whereby courts refused to enforce such agreements, H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924), and further stressed that "[a]rbitration agreements are purely matters of contract,

and the effect of the bill is simply to make the contracting party live up to his agreement. ... an arbitration agreement is placed upon the same footing as other contracts, where it belongs." Id. at 1 (emphasis added).

The Committee hearings held on the proposed arbitration resolutions evidence a similar understanding with regard to the Act's limitations. Julius Cohen, who had assisted in drafting the Arbitration Act inserted a brief explaning the proposed Act's provisions into the Committee record. Arbitration of Interstate Commercial disputes: Joint Hearings on S. 1005 and H.R. 646 Before the subcommittees of the Committees on the Judiciary, 68th Cong. 1st Sess. 15, 33 (1924) (Statement of Julius H. Cohen) (hereinafter Joint Hearings). The brief stated that:

> [A] provision for arbitration contained in any contract which involved maritime transactions ... and interstate commerce ... is made "valid, enforceable, and irrevocable," except upon the grounds for which any contract may be revoked.

. . .

> The Federal Courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties.

Id. at 34. (emphasis added)

Based on the above expressions of intent, and the explicit jurisdictional limitations contained in the Act itself, Congress appears to have intended that an independent basis of jurisdiction other than the United States Arbitration Act would be required in actions involving the Act.

One other matter remains for resolution, and that is the effect of 9 U.S.C. §9 (1970), which provides that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court

> is specified in agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.

The contract herein does contain a provision stating that judgment may be entered upon an arbitration award in any court having jurisdiction. §7.9.1. Further, as the arbitration award upon which Plaintiff relies was apparently rendered in this judicial district (Doc. #1, ¶14, ¶15; Doc. #20, p. 1), §9 would appear to permit this Court to enforce that award. However, given the express statutory directives in §§4 and 8, which limit the district court's jurisdiction to cases wherein the court would otherwise have subject matter jurisdiction, and the Supreme Court's instruction that the Act be read as a whole, Bernhardt, 350 U.S. 198, 201 (1956), this

Court cannot read §9 in so illogical a manner. Such an interpretation would make jurisdiction of actions brought on the basis of identical contracts contingent upon whether the parties involved sought to compel arbitration, or merely wished confirmation of an award already granted through arbitration. It is difficult to perceive the basis for such a jurisdictional distinction, because in both situations, the ultimate result desired would be the same. For a similar decision, refusing to construe the Arbitration Act in a manner which would result in "an odd patchwork of individual statutes, bereft of any coherent plan," see: Bangor Aroostock R.R. Co. v. Maine Central R.R. Co., 359 F. Supp. 261, 263 (D.C. 1973). Cf. Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17, 19 (2nd Cir. 1962) (concluding without discussion, that on the basis of the Robert Lawrence decision, an independent source of federal jurisdiction was required in a proceeding under §9)..

Again, the legislative history of the Arbitration Act sheds light upon the intended meaning of the Act. During the sub-committee hearings held on the proposed Senate and House Arbitration bills, the following exchange took place:

> Representative HICKEY. Without a written agreement, Mr. Cohen, where would an arbitration be held?
>
> MR. COHEN. It would be held in accordance with the direction of the court; by direction of the court to which you apply.
>
> Representative HICKEY. And the application would be made to the court where the party asking for the arbitration resides?
>
> MR. COHEN. You would have to get jurisdiction just as you do now in a Federal court; by personal service.
>
> Representative HICKEY. Where the defendant lives?
>
> MR. COHEN. Where the defendant lives. That would mean practically that you have to go to the jurisdiction where the defendant is, or wait until he comes into your jurisdiction so that process may be served upon him. The process is exactly the same as in civil procedure in the Federal courts.

Joint Hearings, 68th Cong., 1st Sess. 18 (1924) (statement of Julius H. Cohen) (emphasis added). In response to the above colloquy, the Committee Chairman then said:

> Here is the provision relating to that.
>
> > Representative HICKEY. The fourth section?
>
> The CHAIRMAN. This is on page 7, section 10, beginning with line 8 [reading]:
>
> > If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party.
>
> Then this [continuing reading]:

> If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court.

That makes it very clear. Id. at 18-19. This explanation contained in the relevant legislative history indicates that §9 was only intended as a guide to where arbitration should take place when no agreement had been made by the parties, and was not intended as an independent grant of jurisdiction in federal courts.

Based on the foregoing reasoning, the Court concludes that in actions brought to confirm arbitorial awards under §9 of the Arbitration Act, the same prerequisite, of an independent ground of federal jurisdiction, applies as has been required in actions involving other sections of the Act. Having

found no diversity jurisdiction between the parties herein, and no basis for federal jurisdiction other than the United States Arbitration Act, the Court concludes that it does not have subject matter jurisdiction over the present controversy. Therefore, Defendant's Motion to Dismiss must be granted. Although this ruling is dispositive with regard to the continuance of the present action, the Court has determined to address as well the sovereign immunity arguments raised by the Defendant.

C. Sovereign Immunity

The Defendant has maintained that the within action must be dismissed because the Board, as an arm of the State of West Virginia, is immune from suit under the doctrine of sovereign immunity. Defendant has not specified under which portion of Fed. R. Civ. P. 12(b), this ground of dismissal has been raised, but there have been indications by the Supreme Court that such a motion relates to the subject matter jurisdiction of

the Court. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (Rhodes). Therefore, the Court will, on the basis of that ruling, consider Defendant's motion as having been brought pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. The Court also notes that the standards applicable to Rule 12(b)(1) and (b)(6) motions are the same. Id. at 236. Thus, the Court must construe the allegations of the complaint favorably to the pleader, and must in addition follow the accepted rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Before engaging in the analysis required for determining whether the present action against the Board may be maintained, a few comments are in order. First, although the Supreme Court in Rhodes disapproved the

district court's dismissal of the case as a premature decision "precluding any opportunity for the plaintiff by subsequent proof to establish a claim, 416 U.S. at 236, that ruling does not mandate a similar decision herein. Unlike the present case, Rhodes, involved claims against individual state officers for deprivation of federal rights. Those matters were found by the Supreme Court to be judicially cognizable and to not be barred by the application of the Eleventh Amendment. Id. at 237-238. With respect to the alternate ground for dismissal, which had been premised upon executive immunity, id. at 238, the Court indicated that since the immunity to be accorded the executive officers was qualified rather than absolute, id. at 242, 243, 247, and required a determination with regard to whether the state officials acted in good faith, id. at 250, a further development of the factual background of the action was required. Id. Implicit in the Court's statements, however, is that where the

immunity involved is absolute, or is not premised upon a factual question such as the existence of good faith, a decision at the pleading state is appropriate. Therefore, since the issue before this Court involves an immunity which if present, will be absolute, and further, necessitates resolution of no factual matters, the Court concludes that under Rhodes, it may properly proceed to determine whether this action is barred under the doctrine of sovereign immunity.

The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment has long been construed as prohibiting suit against a state by its own citizens or citizens of another state. Hans v. Louisiana, 134 U.S. 1, 10, 14-15 (1889). Therefore, if the present action had been initiated directly against the State of West Virginia, it would unquestionably be barred.

The Defendant herein, however, is the Board of Regents rather than the State of West Virginia. Under Wyoming Highway Comm'n, 278 U.S. 194 (1929), a state agency may enjoy the State's immunity from suit if the agency is found to be an arm, or alter ego, of the state. Id. at 199. By virtue of this theory, then, the Board has claimed that it is merely an arm of the State of West Virginia, and is not subject to suit, except in the West Virginia Court of Claims. In response to this argument, Plaintiff has contended that the Board is not an arm or alter ego of the State of West Virginia; that that the Board is not performing a government function; and that, even assuming that the Board would be immune from suit, the Board has waived its immunity by engaging in interstate commerce.

In Morgantown, 153 W. VA, 121, 168 S.E. 2d 298 (1969), the West Virginia Supreme Court indicated that in order for sovereign immunity to apply, the agency in question must be acting as an arm of the state, and must be

performing a governmental function. Id. at 125-127, 168 S.E. 2d 301-302. This Court has already determined that the Board of Regents is an arm or alter ego of the State of West Virginia, and sees no reason to repeat that lengthy discussion. Moreover, in Morgantown, the Court specifically found administration of the affairs of a state educational association to be a governmental function. Id. at 126-127, 168 S.E. 2d 302. Further, as previously mentioned, the federal courts which are concerned with interpreting and applying West Virginia law, have concluded that suit against the West Virginia Board of Regents is barred under the doctrine of sovereign immunity. Kondas, 318 F. Supp. 394, 396-397 (E.D. W. Va 1970), aff'd. 441 F.2d 1172 (4th Cir. 1972)[3] Given the unequivocal rulings by the State and federal courts of West Virginia, which have been previously cited and thoroughly examined by this Court, the present action against the Board must, absent other circumstances be dismissed. Plaintiff,

[3]Footnote located at end of opinion.

however, has contended that federal law rather than state law, must be applied, and that under Parden v. Terminal Railway of the Alabama State Docks Dept., 377 U.S. 184 (1964) (Parden), the Board has waived its immunity, or consented to suit, by engaging in interstate commerce. The Board has replied by distinguishing Parden from the present situation, and by noting that Parden has been significantly limited by subsequent Supreme Court decision. In addition to these arguments, other points have been raised in the memoranda filed by the parties, and will be addressed to the extent they may be pertinent to the resolution of the matters under discussion.

In Parden, an employee of the Alabama Terminal Railway brought suit in federal court against the Railway pursuant to the Federal Employer's Liability Act, requesting damages for personal injuries sustained while employed by the Railway. Id. The State of Alabama moved to dismiss the action because the

Railway was a state agency, and the State had not waived its immunity from suit. Id. at 185. The Supreme Court found that in enacting the F.E.L.A., Congress had intended to make the statute applicable to every common carrier by railroad in interstate commerce, including state-owned railroads. Id. at 187-188. Specifically, the Court pointed to the "broad and all-embracing" language of the Act, id. at 189, and the fact that if states were exempted from suit under the F.E.L.A., the injured employees of State-owned railroads would have no effective remedy. Id. at 190. The Court further found that by authorizing Congress to regulate commerce, the States had empowered Congress to create a right of action against interstate railroads, id. at 192, and stated that:

> By enacting the F.E.L.A. in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have consented to suit.

Id. Four members of the Court dissented in Parden, id. at 198, on the basis that the legislative history of the F.E.L.A. indicated that "Congress did not even consider the possible impact of its legislation upon State immunity from suits." Id. at 199. The dissent noted that conditioning a state's power to operate in interstate commerce in the manner decreed by the majority should be a decision for Congress rather than the Courts, id. at 198, and further observed that:

> In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by "the most express language or by such overwhelming implication for the text as would leave no room for any other reasonable construction."

Id. at 200, quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909); citing as supportive Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 468-470 (1945).

This Court has taken particular care to discuss the dissenting opinion in Parden, because later modification of the Parden

doctrine has lent increasing importance to the views expressed by the dissent. In Employees v. Dept. of Public Health and Welfare of Missouri, 411 U.S. 279 (1973) (Missouri Employees), the majority opinion was authored by Justice Douglas, who had dissented in Parden. The Supreme Court in Missouri Employees considered whether employees of a Missouri state agency were entitled to bring suit against the State for overtime compensation due to them under §16(b) of the Fair Labor Standards Act of 1938. Id. at 281. Although the state enterprise involved was technically covered by the Act, id. at 283, Justice Douglas and five other members of the Court determined that Congress did not intend to deprive the States of their constitutional immunity from suit. Id. at 285. In Missouri Employees, Douglas did not expressly overrule Parden, but his opinion implicitly rejects the majority language in Parden, and clearly changes the focus of the Parden analysis to that advocated by the Parden dissent.

First, Douglas distinguished Parden from Missouri Employees by noting that Parden involved a business operated by the State "for profit," id. at 284, and "was in the area where private persons and corporations normally ran the enterprise." Id. Douglas then found that where the state activity was not conducted for profit, Congress could only act where the employees "have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised." Id. In addition, Douglas noted that when Congress did act, enormous fiscal burdens could be placed upon the States, and he commented that "Congress, acting responsibly, would not be presumed to take such action silently." Id. at 284-285. Following these remarks, the Court stated that:

> It would . . . be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old §16(b) under which she could not be sued or indicating in some way by clear language that

> the constitutional immunity was swept away.

Id. at 285. (Emphasis added). This emphasized language in particular, alters the majority Parden analysis to fit the view advocated by the dissent in Parden, which would have required an indication by express language that Congress intended to abrogate a state's sovereign immunity. Parden, 377 U.S. at 200.

Plaintiff has suggested in its reply memorandum (Doc. #10) that the Missouri Employees decision has been overruled by Congress' Amendment of the Fair Labor Standards Act in 1974. Congress did amend 29 U.S.C. §216(b) in 1974 to provide that suit could be brought by state employees against their employers. National League of Cities v. Usery, 426 U.S. 833, 838 (1976). However, that action by Congress had no effect upon the analytical framework used by the Supreme Court in the Missouri Employees decision, but rather, indicated Congress' express compliance

with the Court's directive in Missouri Employees that, before a state's traditional immunity would be found to have been abrogated, Congress must provide a clear indication of such an intent. Missouri Employees, 411 U.S. 279, 285 (1973). Congress' compliance with the Supreme Court's Missouri Employees instruction is made abundantly clear in the House of Representatives Report which accompanied the Fair Labor Standards Amendments of 1974. H.R. Rep. No. 93-913, 93rd Cong. 2d Sess. 1, reprinted in [1974] U.S. Code of Cong. & Ad. News 2811. Therein, it was stated that:

> Section 16(b) of the Act is amended to make it clear that suits by public employees to recover unpaid wages and liquidated damages under such section may be maintained in a Federal or State court of competent jurisdiction. This amendment is intended to overcome that part of the decision of the Supreme Court in Employees of the Department of Public Heath v. Missouri (93 S. Ct. 1614, April 18, 1973), which stated that Congress had not explicitly provided in enacting the 1966 amendments that newly covered State and local employees could bring an

action against their employer in a Federal court under section 16.

Id. at 2853. (Emphasis added). Obviously then, the 1974 Amendment of 16(b) was intended only to provide the specific statement of Congressional intent to abrogate immunity which had been requested by the Supreme Court in Missouri Employees, and operated to alter only that part of the decision which exempted states from suit under §16(b).

Although there is no question in this Court's mind regarding the effect of the 1974 Amendments upon the continued vitality of the Missouri Employees decision, the Court notes that in National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court in a plurality opinion written by Justice Rehnquist, id. at 834, ruled that insofar as the 1974 Amendments operated "to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions," id. at 852, they were not within the authority granted to Commerce

by the Commerce Clause. Id. Therefore, the Court reversed the district court's dismissal of the complaint below, which had been brought by various parties, including several states, for a declaration that the 1974 Amendments were invalid as an unconstitutional interference with the states qua States. Id. at 836-837, 839. In addition, the case relied upon by Plaintiff herein, as support for its theory that Missouri Employees is no longer valid, was vacated and remanded by the Supreme Court in light of the decision in National League of Cities v. Usery. See, Dunlop v. State of New Jersey, 522 F.2d 504 (3rd Cir. 1975) vacated and remanded sub. nom. New Jersey v. Usery, 427 U.S. 909 (1976).

The preceding discussion has illustrated that the 1974 amendment of the Fair Labor Standards Act did not overrule the Missouri Employees decision. In order to finally lay to rest any doubts concerning the current effect of that decision, this Court will briefly outline the Supreme Court decisions

after Missouri Employees which have applied or altered the "express language" analysis required by Missouri Employees. The only significant change in the Missouri Employees doctrine appears to have occurred in Hutto v. Finney, 437 U.S. 678 (1978) (Hutto), wherein the Court, in a plurality opinion, ruled that attorney fees could be awarded against the States in actions brought under 42 U.S.C. §1983, even where Congress had not provided express statutory language making a state liable for such fees. Id. at 693-694. In making this determination, the Court first pointed to the extreme breadth of the Civil Rights Attorneys Fees Awards Act, which contained no hint of an exemption for States who happened to be defending injunction actions. Id. The Court then surveyed the legislative history of the Act, and found express evidence therein that Congress had intended to permit attorney fees to be awarded against the States. Id. In addition, the Court distinguished Missouri Employees, and

Edelman v. Jordan, 415 U.S. 651, 672 (1972) (holding Congressional authorization of suit to be a threshold requirement under Parden and Missouri Employees) from Hutto, by noting that those actions had been concerned with "retroactive liability for prelitigation conduct," 437 U.S. at 695, while Hutto involved prospective relief. Id. The Court further restricted its holding by noting that attorney fees had traditionally been awarded without regard to a state's sovereign immunity, id., and by indicating that the limitations placed upon the States by the Fourteenth Amendment may be more stringent than those imposed under the Commerce Clause. Id. at 698-699, n. 27, citing National League of Cities v. Usery, 426 U.S. 833, 852, n. 7 (1976).

Four members of the Court dissented from this portion of the Hutto decision, 437 U.S. at 704, objecting to what they termed "the dilution of the 'clear statement' rule," id. at 707, occasioned by the plurality's reliance

on legislative history rather than explicit statutory language authorizing a monetary recovery against the States. Id. at 706. Justice Powell, writing for the dissent, also stated that he did not find either of the limitations cited by the Court to be justification for such a dilution. Id. at 707. Despite this disagreement, the Hutto modification was applied in Quern v. Jordan, 440 U.S. 332 (1979) (Quern), which considered whether a district court was prohibited by the Eleventh Amendment from ordering the State of Illinois to send a notice to class members, advising them that they might be entitled to past welfare benefits. Id. at 334-335.

In the process of reaffirming its prior holding in Edelman v. Jordan, 415 U.S. 651 (1972), that §1983 did not abrogate the traditional sovereign immunity of the States, 440 U.S. 338-345, and in concluding that the notice involved in Quern constituted the type of prospective relief permitted by Ex Parte Young, 209 U.S. 123 (1908) even in the face of

the Eleventh Amendment, 440 U.S. at 345, 347, the Supreme Court applied the modified Hutto analysis. Id. at 344-345. The Court emphasized, however, that an express statutory waiver of State immunity was required by Missouri Employees, id. at 344, n. 16, and noted again that Hutto was concerned with prospective relief rather than retroactive liability for prelitigation conduct. Id.

The foregoing analysis has indicated that Missouri Employees has contained to be applied in Supreme Court decisions, with a slight analytical modification for cases which involve prospective relief rather than retroactive liability for prelitigation conduct. In addition, the distinction noted by Douglas in Missouri Employees, 411 U.S. 279 (1973), concerning the classification of a state activity as for profit, or not for profit, id. at 284, appears to have been discarded, as later cases concentrate primarily on the threshold issue of whether Congress has authorized suit against the

states. Edelman v. Jordan, 415 U.S. 651, 672 (1972). Assuming arguendo that such a distinction exists, this Court can find no inference of profit-making in the construction of buildings on a state university campus, with all funds pertaining thereto to be deposited in the state treasury. Therefore, because the present case involves retroactive liability for pre-litigation conduct, unlike Hutto, and activity not conducted for profit, the criteria outlined in Missouri Employees, without the Hutto "dilution," are properly applicable to the determination of whether West Virginia's traditional sovereign immunity may be herein set aside.

In order to properly consider the above question, the Court makes two related but necessary assumptions. First, since a statutory basis for waiver of immunity is required under Missouri Employees, the Court assumes that the United States Arbitration Act applies to this proceeding. Again, although Plaintiff did not raise the Act in its

pleadings, the Act has been mentioned by both parties in their memoranda. Therefore, the Court must assume that Plaintiff would amend its pleadings to allege the application of the Act, if offered an opportunity. Secondly, the Court assumes that the Board engaged in the interstate commerce during the transaction at hand. Plaintiff has claimed the Board's participation in interstate commerce involves a factual inquiry and precludes dismissal of the present action at the pleading stage. However, the resolution of this issue in Plaintiff's favor, for purposes of ruling upon the within motion, obviates the necessity of searching beyond the pleadings. Again, while the complaint did not allege interstate commerce activity on the part of the Board, that contention has been raised and discussed by the parties, and is a prerequisite under Missouri Employees, for a finding that West Virginia has waived its immunity, or consented to suit, by engaging in interstate commerce. With these assumptions in mind, the Court now

turns to the threshold question of whether Congress intended the traditional immunity of the States when it enacted the United State Arbitration Act.

First, the Court notes that, on its face, the United States Arbitration Act does not expressly authorize suit against States qua States, or evidence a Congressional intent to abrogate state immunity from suit. Although 9 U.S.C. §1 (1970) defines commerce broadly, that section by its terms does not authorize suit against anyone, but instead merely identifies those transactions which may come within the Act, that is, those involving maritime or interstate commerce. Moreover, although commerce is defined in §1 as "commerce among the several states, . . . or with foreign nations," that definition is only a repetition of the phrasing of U.S. Const. Art. I, §8, cl. 3, wherein Congress is given the power "[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." Simply because

interstate commerce is included within the purview of the Arbitration Act, the conclusion does not follow that the Act was intended to abolish the sovereign immunity of those states engaging in interstate commerce.

The provision of the Arbitration Act which does authorize suit, or provide "a federal remedy," Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967), is 9 U.S.C. §4 (1970). In that section as originally enacted in 1925, and contained virtually unchanged until the present time, a party aggrieved by the failure of another party to arbitrate under a written agreement, could apply to a district court which, except for the agreement, would have jurisdiction of the subject matter of the controversy. As previously noted, in 1925, a federal court could not have had diversity jurisdiction over a contract claim between a state and a citizen of another state. Postal Telegraph, 155 U.S. 482, 487 (1894). Moreover, since the subject matter of an arbitration agreement is purely

contractual, and thus, traditionally within the domain of state courts, it is exceedingly unlikely that a federal court would have had jurisdiction over such an action on any other basis in 1925. However, because that possibility cannot be totally eliminated by the statutory language, which does not exclude states, an analysis of the legislative history of the Arbitration Act is proper in order to determine whether "Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court." Missouri Employees, 411 U.S. 279, 283 (1973). An examination of the legislative history of the United States Arbitration Act establishes beyond peradventure that Congress had no intention of abolishing state immunity from suit when it enacted the Arbitration Act.

The United States Arbitration Act was reported to the House of Representatives as H.R. 646 on January 24, 1924. H.R. 646, 68th Cong. 1st Sess., 65 Cong. Rec. 1430 (1924).

The Judiciary Committee Report which accompanied the bill stated that:

> The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal courts . . . there was no opposition to th bill before the Committee.
>
> . . . .
>
> The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal Courts for their enforcement.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924). When the bill was first debated in the House of Representatives, Mr. Graham, from the House Judiciary Committee, id. at 1, explained that the bill represented an attempt to correct a practice inherited from English Common Law, whereby courts refused to enforce arbitration agreements. Although the parties involved might have contracted to arbitrate, the courts believed that such agreements usurped their jurisdiction. 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham). As has

been previously noted, Graham further commented that the bill "does not involve any new principle of law . . . creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." Id. The bill was then passed unanimously, without debate, by the House on June 26, 1924, 65 Cong. Rec 11081, 11082 (1924), and was then referred to the Senate for consideration by that body. 65 Cong. Rec. 11124 (1924). The Senate also had under evaluation an arbitration bill, S. 1005, which was amended by the Senate Judiciary Committee to conform with H.R. 646 in all essential respects. 66 Cong. Rec. 2759, 2761 (1925). The Senate Judiciary Committee Report accompanying S. 1005 echoed the concerns and legislative purpose expressed by the members of the House of Representatives. S. Rep. No. 536, 63th Cong., 1st Sess. 2, 3 (1924). The Report also specifically set forth a desire to avoid delay in litigation, and noted that "[t]he

settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." Id. at 3 (emphasis added).

On January 31, 1925, the Senate debated the Arbitration Act, and adopted the Senate counterpart to H.R. 646. 66 Cong. Rec. 2759, 2761 (1925). The Senate debate, like that in the House of Representatives, was very brief, and did not address any matter even remotely connected to the subject of sovereign immunity. Id. Finally, on February 4, 1925, the House of Representatives adopted the version of the United States Arbitration Act approved by the Senate, while specifically noting that there were no substantive differences between the Senate version of the Act and that originally passed by the House of Representatives and sent to the Senate. 66 Cong. Rec. 3003, 3004 (1925).

As a final indication of legislative intent, the joint subcommittee hearings held concerning S. 1005 and H.R. 646, do not at any

point address the issue of sovereign immunity, and do not contain any evidence that the Act's contemplated reach would extend to states participating in interstate commerce. Joint Hearings, 68th Cong. 1st Sess. 1 (1924). To the contrary, the hearings illustrate that the transactions thought to be covered by the Act were merely those ordinary dealings between merchants who happened to live in different states. This fact is illustrated by the following colloquy:

> Rep. Charles Stengle: What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce.
>
> Mr. Bernheimer: Yes; entirely. The farmer who will sell his car load of potatoes, from Wyoming, to a dealer in the State of New Jersey, for example.

Id. at 7 (Statement of Charles L.Bernheimer).

The preceding survey of the legislative history of the Arbitration Act has indicated that congress intended the Act to remedy the practice whereby courts had refused to enforce valid arbitration agreements entered into by

parties, but did not intend the Act to create any new rights or obligations. Since permitting suit to be brought against a state on the basis of a contract would unquestionably have created novel rights by abrogating traditional concepts of state immunity, Congress cannot "be presumed to have taken such action silently," Missouri Employees, 411 U.S. 279, 284-285 (1973), particularly when the language of the statute itself does not indicate an intent to sweep away constitutional immunity. Id at 285.

Having concluded that the legislative history and explicit statutory language of the United States Arbitration Act do not evidence a Congressional intention to abrogate the States' sovereign immunity, the Court further finds that Congress did not, in fact, abolish the States' traditional immunity from suit by passage of the Arbitration Act. Because this conclusion is dispositive under Missouri Employees, the Court need not address the further question of whether the Board has

waived its immunity by engaging in interstate commerce after the passage of the Act. Thus, since the Board, as an arm of the State of West Virginia, is immune from suit under both State and federal law, the within action against the Board of Regents is barred. In so holding, the Court notes that the Plaintiff does have a viable remedy against the Board in the West Virginia Court of Claims. Parden, 377 U.S. 184, 190 (1964); Morgantown, 153 W. Va. 121, 168 S.E. 2d 298 (1969).

IV. Conclusion

Based on the preceding analysis, the Court finds that:

1. Plaintiff's request for a preliminary injunction is denied, due to the fact that Plaintiff has failed to demonstrate either a likelihood of success on the merits, or the existence of irreparable harm;
2. Defendant's Motion to Dismiss is granted, because this Court does not have jurisdiction over the subject matter of the present action.
3. The Plaintiff's motions, seeking orders of the Court to compel discovery and expressing

a disinclination to sustain the Defendant's motion to dismiss, are deemed moot and will, therefore, not be ruled upon.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/S/ WALTER H. RICE
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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[1]Plaintiff has once more raised this issue in a Motion to Compel Discovery, filed on November 3, 1981. In the Memorandum accompanying that Motion, Plaintiff has cited the case of Soni v. Board of Trustees of the University of Tennessee, 513 F.2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976) (Soni), as support for the theory that the Plaintiff must be permitted to conduct an inquiry into the factual circumstances surrounding the transaction in question herein. However, the Court does not feel that the Soni decision requires allowance of such an inquiry, for several reasons. First, and most important, the legal situation presented in Soni was fundamentally different from that of the present case. In Soni, the Court noted that it had "been unable to find any case discussing the University's status under the Eleventh Amendment." Id at 352. The Court then stated:

> We are uncertain whether the University of Tennessee is a state instrumentality protected by the eleventh amendment. The record before us contains little data on the University's financial relationship with the State of Tennessee, and the Tennessee cases and statutory materials do not compel a conclusion one way or the other.

Id. at 352. In the present case, as is more fully set forth in the body of this Opinion, the state and federal courts of West Virginia have in this Court's view, indicated unequivocably that the Eleventh Amendment immunity of the State of West Virginia extends to the West Virginia Board of Regents. Therefore, this Court concludes that the factors which prompted the decision in Soni are simply not found herein, and that consequently, no factual inquiry is necessary.

Second, assuming arguendo that the Soni decision is applicable to this case, there are several reasons why a factual inquiry is still not in order. Merely because the Sixth Circuit stated that each state university "must be considered on the basis of its own peculiar circumstances," id, the conclusion does not automatically follow that the inquiry involved must be factual. When the Court in Soni made the foregoing statement, it was referring to the importance of the governmental context of each state university. In particular, the Court noted that the Tennessee State Constitution did not grant immunity to Tennessee University, while in some other cases wherein immunity had been found to exist, the University in question had been granted immunity by a specific provision of the state constitution. Id. In the present case, this Court has conducted an examination into the governmental context of the Board by reviewing the West Virginia statutes which create and define the Board's status and responsibilities, and has concluded that under the law of West Virginia, the Board of Regents would not be subject to suit on the basis of the activities involved herein. Moreover, as was noted in the main text of this Opinion, such an analysis was not required in view of the dispositive rulings of the West Virginia state and federal courts, but was nevertheless conducted, in order to provide the most thorough foundation for this Court's conclusions.

Having concluded then, that Soni does not mandate an analysis dissimilar to that which has been previously employed herein, the Court therefore finds that there is no need to further postpone the resolution of this matter in order to permit Plaintiff to inquire into the factual circumstances surrounding the Board's conduct. Accordingly, the Court must deny Plaintiff's Alternative Motion for a Statement of the Court's Disinclination to

Sustain Defendant's Motion to Dismiss, as well as Plaintiff's Motion to Compel Discovery, since that Motion has been rendered moot by the Court's disposition of Defendant's Motion to Dismiss. Further, even if Plaintiff's Motion had been well taken, the Court would not have been inclined to award Plaintiff expenses under Fed. R. Civ. P. 37(a). In light of the Court's announcement in August, 1981, that it intended to grant Defendant's Motion to Dismiss, the Defendant's refusal to engage in further discovery was not without substantial justification.

[2]The Sixth Circuit, however, did state in Local 19, Warehouse, Processing and Distributive Workers Union, Retail, Wholesale and Department Store Union v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956) cert. denied 354 U.S. 910 (1957), (Local 19) that under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, and 9 U.S.C. §1 et seq., "jurisdiction is derived from Article 111 of the United States Constitution, which gives the courts of the United States jurisdiction in cases 'in Law and Equity' arising ...the Laws of the United States." Id. at 780. (citation omitted). This language, insofar as it tracks the "arising under" language of 28 U.S.C. §1331 (1966), which gives federal courts original jurisdiction of actions arising under the laws of the United States, appears to be an indication that the Sixth Circuit views the United States Arbitration Act as providing a jurisdictional basis for arbitration actions. However, for several reasons, which will be hereinafter set forth, this Court has concluded that the Sixth Circuit did not intend to adopt such a ruling in Local 19.

First, the above comments by the Sixth Circuit arose in the context of a discussion of the appropriate substantive law to be applied in Local 19. In that case, the Union

and Buckeye Cotton Oil Co. had entered into a collective bargaining agreement providing for arbitration of contractual disputes. Id. at 779. In the petition filed with the District Court, the Union alleged that Buckeye had violated the agreement by working employees overtime without appropriate compensation, and had refused to arbitrate when requested to do so by the Union. Id. at 780. The Union asked that the Court enjoin Buckeye from violating the agreement for overtime pay, and that Buckeye be ordered to submit the dispute to arbitration. Id.

The District Court dismissed the complaint by applying Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955) (Westinghouse), wherein the Supreme Court had severely restricted the extension of §301. In Westinghouse, the Union brought suit against the employer on behalf of unnamed employees, alleging that the employer had violated the collective bargaining agreement by deducting wages for a date when the employees were absent from work. Id. at 439. The Union requested an interpretation and declaration of the contractual rights of the parties, an accounting, and a judgment for the amount of the unpaid wages. Id. Five members of the Supreme Court agreed to affirm the dismissal of the complaint for lack of jurisdiction, holding that Congress did not intend, under §301, to confer jurisdiction in federal courts over actions brought by unions to enforce "individual" id. at 460, or "personal" id. at 461, rights of employees.

The Supreme Court in Westinghouse did not define which contractual rights would not be considered personal to employees and would thus be sufficient to confer jurisdiction on a federal court. The right to recover unpaid overtime compensation which was involved in Local 19 appears to fall directly within the Westinghouse prohibition, and indeed, that was

the foundation for the District Court's dismissal of the complaint. Local 19, 236 F.2d at 778. The Sixth Circuit, however, held that Westinghouse was not controlling, by finding that a promise to arbitrate was not a personal right of an employee. Id at 779. (emphasis added).

The District Court in Local 19 had also premised its dismissal of the complaint on the fact that executory agreements to arbitrate were not enforceable under Tennessee law, and on the fact that injunctive relief in labor disputes was forbidden by the Norris LaGuardia Act. Id. at 778. The Court of Appeals found that the rights involved in Local 19 were not purely state-created rights, and that therefore Tennessee state law was not controlling. Id. at 780-781. In reaching this conclusion, the Court noted, as previously mentioned, that an action under §301 and the Arbitration Act was one "arising under...the Laws of the United States." Id. at 780, citing Local 205, United Electrical, Radio and Machine workers of America v. General Electric Co., 233 F.2d 85; aff'd 353 U.S. 547 (1957) (Local 205). Local 205, which was cited by the Sixth Circuit made no comment regarding the jurisdictional effect of the Arbitration Act, but instead only stated that jurisdiction under §301 arose under Article III of the Constitution. Id. The Sixth Circuit concluded, however, that since the rights involved were created in part by federal law, then Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) and other related cases did not require the application of Tennessee law. 236 F.2d at 780.

The employer in Local 19, however, also cited the Westinghouse decision as having held that state law governed §301 actions. Id. at 781. The Sixth Circuit disagreed, by first stating that the Supreme Court in Westinghouse had construed §301 solely with reference to a

suit for payment of wages, and had not construed the term "suits for violation of contracts between an employer and a labor organization." Id. The Court then concluded that its prior decisions, which had authorized injunctions in suits based on violations of such contracts, were still good law. Id. This distinction is somewhat less than persuasive, however, given the fact that Westinghouse involved a violation of a collective bargaining agreement in effect between a union and an employer, Westinghouse, 348 U.S. 437, 439 (1955) (emphasis added). Moreover, three members of the Westinghouse Court described §301 as merely affording "procedural directions to the federal courts," id. at 443, in actions where "an unincorporated association that happens to be a labor union appears," id., while two other members of the Court stated specifically that Congress did not appear to have authorized "a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained." Id. at 461.

In addition to the above conclusion, which seems tenuous at best, given the fact that Westinghouse and Local 19 both involved suits based on alleged employer violations of collective bargaining agreements, the Sixth Circuit also noted that state law did not control because the union had rights and remedies created by the United States Arbitration Act. Local 19, 236 F.2d at 781. The Court then determined that the Norris-LaGuardia Act did not prohibit injunctive relief of the type involved in Local 19 (i.e., specific performance of the arbitration agreement). Id. at 782-783. The Sixth Circuit then found that it was free to follow its prior decision in Milk & Ice Cream Drivers and Dairy Employees Union Local No. 98 v. Gillespie Milk Products, 203 F.2d 650, 651 (6th Cir. 1953) (Gillespie Milk Products), wherein it had "held that the use of the

injunctive process was authorized for full enforcement of the rights created by Section 301." Local 19, 236 F.2d at 782. The Court also held that §4 of the Arbitration Act could be applied in Local 19 to require the Buckeye Cotton Oil Company to arbitrate. Id. at 784.

The Court in Local 19 did not explain why it chose to resort alternatively to the Arbitration Act in Local 19, despite the fact that the Act was not even mentioned in Gillespie Milk Products, which had also been an action involving arbitration. 203 F.2d at 651. However, the Court in Local 19 did acknowledge that:

> [T]here is a conflict in the adjudication of both the district courts and circuit courts upon all points covered in this opinion.

Id at 783.

Given the confusion in the law, and the likely future resolution of the conflict among the jurisdictions by the Supreme Court, the Sixth Circuit appears to have been merely providing an alternative method by which specific enforcement of an arbitration clause could be granted. The Sixth Circuit's alternative jurisdictional comments, 236 F.2d at 780, and its failure to address the specific jurisdictional limitations contained in the Arbitration Act may also be explained on this ground.

In 1957, the Supreme Court did resolve the conflict among the jurisdictions by handing down two decisions which obviated the need for the alternative approach used by the Sixth Circuit in Local 19, and eliminated the need for application of the United States Arbitration Act to §301 actions, by holding that §301 did indeed confer substantive rights. In Textile Workers Union of America

v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) (Lincoln Mills), the Supreme Court considered whether a district court had authority under §301 to order an employer to comply with the grievance arbitration provisions of a collective bargaining agreement. Id at 449. The Court noted that the lower courts had construed §301 differently, with some courts holding that §301(a) merely provided jurisdiction in labor disputes, without supplying a source of substantive law, id, at 450, while other courts had held that §301(a) was more than jurisdictional in that it authorized federal courts to "fashion a body of federal law," id. at 451, which would include "specific performance of promises to arbitrate grievances under collective bargaining agreements." Id. The Court then expressly adopted the latter view, id, and further found that the Norris Laguardia Anti-Injunction Act did not withdraw the Court's jurisdiction to compel arbitration. Id. at 457-458. Interestingly enough, the Lincoln Mills Court barely referred to Westinghouse, beyond noting in a footnote that it was "quite a different case," id. at 456, n.6, involving as a basic question the union's standing to sue and recover on individual employment contracts. Id. However, the Supreme Court in Smith v. Evening News Ass'n, 371 U.S. 195 (1962), did recognize that Lincoln Mills and other "subsequent decisions here have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent." Id. at 199.

The failure of the Supreme Court to even mention the United States Arbitration Act in Lincoln Mills is a clear implication that the Court rejected its application in §301 actions. In fact, Justice Frankfurter stated as much in his dissent to Lincoln Mills. 353 U.S. at 467-469. (Frankfurter, J., dissenting). Moreover, in a companion case

decided the same day as Lincoln Mills, the Supreme Court expressly rejected the concept that the United States Arbitration Act provided a substantive body of law or set of remedies to be applied in §301 actions. In General Electric Co. v. Local 205, United Electrical, Radio and Machine Workers of America, 353 U.S. 547 (1957), the Supreme Court affirmed the Second Circuit's reversal of the district court's ruling that a §301 action to compel arbitration was barred by the Norris-LaGuardia Act. Id. at 548. As previously noted herein, the appellate court in that case had held that the Arbitration Act provided the substantive law and remedies to be applied in §301 actions. Local 205, 233 F.2d 85, 96-101 (1st Cir. 1956). The Supreme Court stated that it "would follow in part a different path, though we reach the same result," (i.e., that the Norris LaGuardia Act did not bar relief) 253 U.S. at 548. Citing Lincoln Mills, the Court then said:

> We think that §301(a) furnishes a body of federal substantive law for the enforcement of collective bargaining agreements in industries in commerce or affecting commerce and that the Norris-LaGuardia Act does not bar the issuance of an injunction to enforce the obligation to arbitrate grievance disputes.

Id. Thus, after the Supreme Court's decision in Lincoln Mills, and its affirmance of Local 205, there was no longer any confusion with regard to the ability of courts to deal with requests for specific enforcement of arbitration under §301, and no necessity for alternate approaches to be developed in the event that §301 was eventually determined to be jurisdictional only.

The foregoing analysis has not been intended by this Court as a suggestion that

the Sixth Circuit's jurisdictional comments in Local 19 were rejected by the Supreme Court. Rather, such an examination has been conducted in an effort to provide the necessary background for understanding both the Sixth Circuit's decision in Local 19, which failed to address the substantial jurisdictional limitations expressly stated in the Arbitration Act, and this Court's conclusion, that statements entered in a framework of uncertainty and confusion among the circuit courts with regard to their ability to grant specific performance of agreements under §301, do not abrogate this Court's responsibility to conduct a thorough and well-intentioned analysis of the jurisdictional requirements of the United States Arbitration Act. Therefore, the Court concludes that Local 19 does not require a conclusion on this Court's part that the Arbitration Act provides jurisdiction herein.

[3]As previously noted, in the Court's discussion of diversity jurisdiction, Plaintiff has cited the Kondos case for a number of incorrect propositions. In addition to those items formerly commented upon by the Court, Plaintiff has contended that the Kondos sovereign immunity ruling, and thus all comments in Kondos regarding the Board's role as an arm of the State, are merely dicta, because the decision of the district court actually was premised solely upon the fact that the complaint did not state a cause of action in libel against the President of Marshall University. (Doc. #8, p. 4). Since the dismissal of the claim on that ground ended any potential claim against the Board of Regents, Plaintiff has argued that, therefore, any other matters discussed in Kondos were surplusage. However, an examination of the Kondos decision indicates that Plaintiff's reading is erroneous, and that in fact, the Court's holding therein was directly contrary to Plaintiff's contentions. In Kondos, the

Plaintiff had sued the West Virginia Board of Regents, and the President of Marshall University, Roland Nelson on two grounds, for breach of an employment contract, and for the alleged publication of defamatory remarks by Nelson. 318 F. Supp. at 395, 397. Both defendants had filed motions to dismiss, claiming immunity from suit. Id. at 396. The Court first considered the Board's Motion and found that the Board, which was immune from suit as an arm of the State of West Virginia, must be dismissed from the action. Id. at 396-397. Then, the Court considered Nelson's motion, and found that since there were no allegations that Nelson had transgressed the authority given him by the Board, the breach of contract claim against him must also be dismissed. Id. With respect to the libel and slander claim against Nelson, however, the Court conducted an analysis of the pertinent law, and found that under the circumstances present, his actions must have been malicious for a claim to be stated. Id. at 397-398. Because no allegations of malice had been made, the Court ruled that the complaint did not state a cause of action against Nelson, but granted the plaintiff an opportunity to amend his complaint to allege with particularity the libelous words, and slanderous material involved, as well as the circumstances surrounding their utterance and publication by Nelson. Id. at 398. Thus, while the action against the Board was dismissed, the Court specifically found that an action against Nelson, the President of Marshall University, might be maintained. This Court regrets the necessity for engaging in the foregoing laborious explanation of a point which should be obvious, but has felt constrained to do so in light of the Plaintiff's incorrect analysis of the Kondos decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HUGHES-BECHTOL, INC., *

Plaintiff * CASE NO. C-3-81-038

-vs- * (Filed February 17, 1982)

WEST VIRGINIA BOARD OF REGENTS, *

*

Defendant

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT AND TO ADMIT EXHIBITS INTO EVIDENCE

This matter is before the Court pursuant to the Motion of Plaintiff Hughes-Bechtol, Inc., to alter or amend the Court's Judgment of December 4, 1981, and to admit certain exhibits into evidence. After careful consideration of Plaintiff's request, the Court has concluded that it is not well taken, and, therefore, must be denied.

On the above date, this Court filed a lengthy Entry wherein it concluded, inter alia,

that the Complaint against the Defendant, the West Virginia Board of Regnts, must be dismissed for lack of subject matter jurisdiction. Briefly stated, the Court's decision was premised upon two factors, either of which would have required dismissal of this action. First, the Court determined that because the allegations of the Complaint did not disclose diversity of citizenship or any other basis for federal jurisdiction, the action must be dismissed. Second, the Court found that even if jurisdiction existed, the Plaintiff was barred from recovery by the doctrine of sovereign immunity.

Plaintiff has requested that the Court withdraw its judgment of dismissal and permit Plaintiff to introduce evidence which would show that the monies used to finance the Henderson Center Project were derived from a self-liquidating bond issue secured by student tuition fees, and were segregated

in a construction account. Plaintiff has urged that these facts indicate that the Board of Regents is a proprietary entity and is, accordingly, not entitled to sovereign immunity. These matters have been repeatedly called to the Court's attention in prior memoranda submitted by Plaintiff, and were addressed by the Court in specific fashion in the Entry previously filed. See, Hughes-Bechtol, Inc. v. West Virginia Board of Regents, No. 81-038, slip op. at 12-17, 41 (S.D. Ohio, Dec. 4, 1981). Therein, the Court revealed its awareness that the project in question may have been financed by a self-liquidating bond issue, and simultaneously noted that the relevant consideration, as dictated by the West Virginia Supreme Court, was that the funds were required to be paid into the West Virginia State Treasury. Id. at 16-17. The Court has found nothing in the materials submitted

by Plaintiff which would alter that conclusion. In fact, Exhibit A attached to Plaintiff's Motion to Alter or Amend the Judgment indicates that the construction funds in question were held by the West Virginia State Treasury. See, Exhibit A, p. 18.

Moreover, even if the "facts" herein had indicated otherwise, i.e., that the construction funds were not deposited into the State treasury, the Court would not have been inclined to revise its previous opinion that the Board of Regents is both an arm, or alter ego of the State, and is entitled to sovereign immunity, since that conclusion was premised primarily, if not entirely, on the unambiguous and unequivocal rulings of the West Virginia state and federal courts. Because these courts have indicated that the Board of Regents is an arm of the state, and is entitled to the protection of sovereign

immunity, this Court would be engaging in heedless indiscretion should it choose to conclude otherwise. Accordingly, since the arguments advanced by Plaintiff in support of the motion under consideration were previously presented to, and rejected by, the Court, Plaintiff's Motion to Alter or Amend the Judgment and Request to Admit Exhibits into Evidence, must be and hereby is denied.

/s/ Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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RECOMMENDED FOR FULL TEXT
PUBLICATION
See, Sixth Circuit Rule 24

No. 82-3217

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUGHES-BECHTOL, INC., :

Plaintiff-Appellant, : On Appeal from the United States
v. : District Court for the Southern
WEST VIRGINIA BOARD OF REGENTS, : District of Ohio, Western Division
:
Defendant-Appellee.

Decided and Filed June 18, 1984

Before: EDWARDS and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge. This case originated in the Federal District Court for the Southern District of Ohio, where plaintiff filed its Complaint against the defendant, West Virginia Board of Regents,

praying for judgment in the amount of $1,521,826 compensatory and punitive damages and for declaratory relief pursuant to 28 U.S.C. §2201 and F.R. Civ. P. 57. The Complaint alleged that plaintiff is and was at all times mentioned therein, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and that the defendant, West Virginia Board of Regents, is and was a citizen of the State of West Virginia, and that the Court has diversity jurisdiction under and pursuant to 28 U.S.C. §1332, and federal question jurisdiction under 28 U.S.C. §1331(a) because a question has arisen under the Eleventh Amendment to the Constitution of the United States.

The defendant, West Virginia Board of Regents, filed a motion to dismiss for lack of jurisdiction alleging that it was not a citizen of West Virginia, but was an agency or alter-ego of the State. The District

Court granted the motion to dismiss in an opinion in which it adopted findings of fact and conclusions of law and held that the West Virginia Board of Regents was not a citizen of the State of West Virginia but was in truth and fact an arm or agency of the State, and that diversity of citizenship required under 28 U.S.C. §1332 for jurisdiction of the Court in the present case did not exist. Hughes-Bechtol, Inc., Plaintiff, v. West Virginia Board of Regents, Defendant, 527 F. Supp. 1366 (1981). The court also denied plaintiff's motion for a preliminary injunction. Plaintiff then filed a motion to alter or amend the judgment, which motion the court denied.

Plaintiff has appealed therefrom to this Court, arguing that defendant is not the alter-ego of the State, and that the suit is not otherwise barred by the Eleventh Amendment. For the reasons hereinafter stated, we affirm.

I

Facts

Pertinent facts were found by the District Court as follows:

1. Hughes-Bechtol, Inc. (also "contractor") is a corporation organized under the laws of the State of Ohio, with a principal place of business in Ohio, and an annual volume of business of approximately thirty million dollars ($30,000,000).

2. Marshall University is a state university located in Huntington, West Virginia. Marshall University has an enrollment of approximately twelve thousand students, and participates in Division I athletics.

3. In 1979, the West Virginia Board of Regents (also "owner") solicited bids in connection with the construction at Marshall University of Henderson Center, which was intended to be a multipurpose physical education facility including a basketball arena seating ten thousand persons, class-

rooms for the department of health and physical education, and offices for the athletic department. Also included in this project was the renovation of an existing building, Gullickson Hall.

4. Hughes-Bechtol was awarded a contract in the amount of three million, one hundred sixty two thousand one hundred and seventy-three dollars ($3,162,173.00) for the mechanical work for the Multi-Purpose Physical Education Facility. According to the terms of the contract, the work to be performed was to be commenced upon the date specified in the "Notice to Proceed" given by the Board to Hughes-Bechtol. From the time specified, Hughes-Bechtol would have eight hundred and fifty (850) consecutive calendar days to fully complete the project.

5. On April 5, 1979, a purchase order was issued by the State of West Virginia, Department of Finance and Administration for the above contract price.

6. The original anticipated completion date for the Henderson Center Project was April 6, 1981, but at the time of the injunction hearing, the physical activities center was scheduled for occupancy on October 15, 1981, due to delays in the project. At the time of the hearing herein, the project was ninety percent (90%) finished.

7. During the first year of the contract, little progress was made on the construction project. Hughes-Bechtol requested an extension of time and payments for the increased costs due to the delay, but the Board refused, and instead directed that Hughes-Bechtol perform the unfinished work in the time remaining under the contract.

8. Paragraph 7.9.1 of the contract between the Board and Hughes-Bechtol provided that all disputes arising between the owner and the contractor would "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the

American Arbitration Association," that the agreement to arbitrate "shall be specifically enforceable under the prevailing arbitration law," and that "the award entered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

9. On December 11, 1980, Hughes-Bechtol filed a demand for arbitration with the Cincinnati office of the American Arbitration Association. The arbitration inquiry was bifurcated, with consideration being first given to whether the issue was one subject to arbitration. On February 20, 1981, the arbitrator ruled that the matter was arbitrable, and notified the parties of his decision. A hearing on the claims of Hughes-Bechtol was held, and on June 9, 1981, after the filing of the within lawsuit, the arbitrator issued his decision, finding that Hughes-Bechtol was entitled

to an additional sum of five hundred twenty-one thousand three hundred twenty-six dollars and forty-eight cents ($521,326.48).

10. The Board did not participate directly in the arbitration hearings, but did have a legal representative present. On various occasions, the Board and the West Virginia Attorney General's Office advised Hughes-Bechtol and the American Arbitration Association that the Board of Regents was not authorized to engage in binding arbitration.

11. Paragraph 9.7 of the contract provided that if an amount awarded through arbitration was not paid by the owner, the contractor was permitted to stop work. After the Board refused payment of the arbitration award, Hughes-Bechtol removed its work forces from the Henderson Center construction site on July 20, 1981.

12. The other contractors on the Henderson Center project have agreed to pursue

remedies for contractual claims against the Board in the West Virginia Court of Claims.

. . .

18. Payments for the Henderson Center project come from the State treasury of West Virginia. The project was financed by a public bond sale, with student revenues for future years obligated to pay for the project. All funds expended by the Board of Regents are state funds from the state treasury and may only be spent pursuant to an appropriation by the West Virginia legislature. All funds received by the Board from all other sources such as federal funds or gifts must be deposited in the state treasury and may be expended only for their specified purposes, and after appropriation by the West Virginia legislature.

19. If Hughes-Bechtol does not complete its contractual obligations, the Board intends to secure other contractors to perform the work.

20. The State of West Virginia has authorized suit to be brought against the State in the West Virginia Court of Claims.

II.

Law

The question whether the Board is and was a citizen of West Virginia or an agency or alter-ego of the State for purposes of diversity jurisdiction is purely a question of federal law. See Long v. Richardson, 525 F.2d 74, 79 (6th Cir. 1975). In this case, however, we hold that it is governed by the law of West Virginia.

The district Court in its opinion stated:

> The principle is well settled that a state may not be considered a citizen in order to establish diversity jurisdiction. In Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 15 S. Ct. 192, 39 L. Ed. 231 (1894) (Postal Telegraph), the State of Alabama had initiated suit in an Alabama state court against a New York corporation in order to recover taxes owed to the State. Id. at 482, 483, 15 S. Ct. at 192, 193. The Defendant removed the case to federal court, but the Supreme

Court ruled that removal was improper, since neither diversity nor federal jurisdiction was present. Id. at 487, 15 S. Ct. at 194. With respect to diversity, the Court stated that:

> A state is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it unless it arises under the Constitution, laws or treaties of the United States.

Id. (citations omitted).

In State Highway Comm'n of Wyoming v. Utah Constr. Co., 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262 (1929) (Wyoming Highway Comm'n), a Utah citizen filed a breach of contract action against the Wyoming State Highway Commission in a Wyoming district court, alleging jurisdiction on the basis of diversity of citizenship. Id. at 198, 49 S. Ct. at 105. Although the State of Wyoming had not been named as a party to the action, the Court held that since the suit was in effect against the State, diver-

sity of citizenship could not exist. Id. at 199-200, 49 S. Ct. at 105-106. The Court appeared to premise its determination that the State was the real party in interest on the following factors: (1) the highway commission was merely an arm or alter ego of the state, "with no funds or ability to respond in damages," id. at 199, 49 S. Ct. at 106; and (2) neither the Highway Commission nor its members had assumed any direct or personal responsibility by entering into the contract in question. Id. Significantly, the Court found it unnecessary to consider the effect of the State's grant to the Highway Commission of the power to sue or be sued, or its later withdrawal of that power. Id. The Court indicated that since the State was not considered to be a citizen for purposes of diversity, "[N]o consent by the State to submit itself to suit could affect the question of diverse citizenship." Id. at 199-200, 49 S. Ct. at 105-106. Thus,

even should a state consent to suit in federal court, that act itself cannot create diversity jurisdiction.

Like the Highway Commission in the previously cited case, the Board of Regents is a statutorily-created creature. W. Va. Code §18-26-1 (1969) specifically provides that:

> The purpose of the legislature in the enactment of this article is to establish a state agency to be known as the West Virginia Board of Regents, which will have the general determination, control, supervision and management of the financial, business and educational policies and affairs of all State Colleges and Universities.

(emphasis added). Moreover, an examination of West Virginia law reveals that the board has no funds or ability to respond in damages but is merely a conduit through which budget requests from the state universities, and corresponding appropriations from the West Virginia legislature, flow. For example, W. Va. Code §18-26-8 (1981) lists certain duties of the Board, which involve,

inter alia: (1) directing the preparation of budget requests for state universities; (2) the submission of budget requests and analysis of requests to the legislature; (3) compilation of an annual report indicating the fiscal perfcrmance of the state system of higher education. Although some of these duties were more specifically delineated by the amendment of §18-26-8 in 1981, the essential nature of the Board's function has not changed from former practice. See former W. Va. Code §18-26-8 (1969).

Other pertinent cases which hold that the Board is an agency and alter-ego of West Virginia are Kondos v. West Virginia Board of Regents, 318 F. Supp. 394 (S.D. W. Va. 1970), aff'd, 441 F.2d 1172 (4th Cir. 1971); City of Morgantown v. Ducker, 153 W. Va. 121, 168 S.E.2d 298 (1969); and West Virginia Board of Regents v. Fairmont, Morgantown and Pittsburgh

R.R. Co., 155 W. Va. 863, 189 S.E.2d 40 (1972). Cf. Bailey v. Ohio State University, 487 F. Supp. 601 (S.D. Ohio 1980); Soni v. Board of Trustees of the University of Tennessee, 513 F.2d 347 (6th Cir. 1975).

The West Virginia Constitution Article VI §35 provides:

> The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

The state and its agencies performing state functions statewide are entitled to this absolute immunity.

We also emphasize that the Purchase Order issued by the State on April 5, 1979, supra, specifically constituted acceptance of the agreement "made by and between the State of West Virginia, by the Commissioner of Finance and Administration for the West

Virginia Board of Regents" and Appellant.

The Constitution, statutes, and federal and state case law of West Virginia, as well as the undisputed facts, are dispositive of the status of the Board as an agency and alter-ego of the State, and of the absence of diversity jurisdiction in this case.

The District Court had no jurisdiction to determine appellant's rights under 28 U.S.C. §1331(a) involving the Eleventh Amendment to the Constitution, as this statute does not confer jurisdiction. It is settled that a suit arises under the constitution only if the plaintiff's own cause of action is based thereupon, and it is not enough that plaintiff alleges some anticipated defense to his cause of action which can be raised under the Constitution. See Louisville and Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152 (1908). The same result attaches to a suit for declaratory relief. Skelly Oil Co. v. Phillips Petrol-

eum Co., 339 U.S. 667, 672 (1950). We, therefore, decline to address the merits of the Eleventh Amendment issues raised by appellant. See Escambia County, Florida v. Henry T. McMillan, 52 U.S.L.W. 4397, 4398 (U.S. March 27, 1984), citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Justice Brandeis, concurring).

The state courts of West Virginia that have jurisdiction over the Board can be resorted to by appellant. It is not necessary for us to decide other issues raised by appellant, as they may be addressed when appellant resorts to those courts.

On the issue of arbitration, see McDonald v. City of West Branch, Michigan, -- U.S. --, 52 U.S.L.W. 4457 (U.S. April 18, 1984), in which the Supreme Court held that federal courts should not, in actions under 42 U.S.C. §1983, afford res judicata or collateral estoppel effect to awards in arbitration proceedings brought pursuant to terms

of the collective bargaining agreement.

The judgment of the District Court is affirmed.

C. OTHER OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW RENDERED BY COURTS OR ADMINISTRATIVE AGENCIES

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

HUGHES-BECHTOL, INC.
Dayton, Ohio
-and-
WEST VIRGINIA BOARD OF REGENTS
Charleston, West Virginia

CASE NUMBER: 52 10 0186-80

(Dated February 20, 1981)

INTERIM AWARD OF ARBITRATOR(S) ON THE ISSUE OF ARBITRABILITY

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 5, 1979 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

1. This cause came on for hearing before a duly appointed arbitrator at Dayton, Ohio, on February 10 and 11, 1981. The claimant, Hughes-Bechtol, Inc., appeared and presented evidence by witnesses and Argument by Counsel. The respondent, the West Virginia Board of Regents, did not appear.

2. The arbitrator finds as a MATTER OF FACT and CONCLUSION OF LAW that the matter is one which is subject to arbitration.

3. A date to be set by the Tribunal Administrator, not less than fifteen (15) days from the date of receipt of a copy of this decision by the Board of Regents of the State of West Virginia is designated for the continuation of the case for presentation of evidence on the merits of the claim.

/s/ Robert Bruce Shearer February 20, 1981
ROBERT BRUCE SHEARER (dated)

DATED:

STATE OF)SS.:

COUNTY OF

On this day of , 19 , before me personally came and appeared to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

HUGHES-BECHTOL, INC.
Dayton, Ohio
-and-
WEST VIRGINIA BOARD OF REGENTS
Charleston, West Virginia

CASE NUMBER: 52 10 0186-80 (Dated June 9, 1981)

FINAL AWARD OF ARBITRATOR(S)

I, (WE), THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 5, 1979 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD/xxxx/xxxx Finds as follows:

This cause having come before the Arbitrator on demand by Claimant, HUGHES-BECHTOL, INC.,

for determination of liability and the amount therefor, based upon the alleged breach of contract by the Board of Regents, State of West Virginia. The Arbitrator finds, based on the oral hearing where the Board of Regents was represented by counsel, who entered a special appearance, the testimony and evidence presented at those hearings held at Dayton, Ohio on March 18 and 19, and April 9 and May 29, 1981, including proofs tendered, pursuant to Rule 42 of the Rules of the American Arbitration Association that the following award is fair and just.

THEREFORE, I AWARD AS FOLLOWS:

1. Claimant, HUGHES-BECHTOL, INC. should be reserved the right to arbitrate any claims by or against the BOARD OF REGENTS or other claim of liability for any items under the warranty provisions of the contract.
2. The right shall be reserved to Claimant,

HUGHES BECHTOL, INC., for further arbitration on any claims made by any subcontractor, where such claim made by any subcontractor, where such claim is based on delay found or alleged to be caused by the delay on the part of the BOARD OF REGENTS OF THE STATE OF WEST VIRGINIA under the contract herein involved.

3. Claimant, HUGHES BECHTOL, INC., shall not be liable for any damages, liquidated or otherwise because of late or delayed completion of the work requested under this contract.

4. Claimant, HUGHES BECHTOL, INC. is entitled except as herein provided, to be paid the sum of FIVE HUNDRED TWENTY-ONE THOUSAND THREE HUNDRED TWENTY-SIX DOLLARS AND FORTY-EIGHT CENTS ($521,326.48) for all claims for the performance of the contract herein involved based upon a performance period of 795 days as alleged and supported by the evidence of record.

5. The administrative fees and expenses of the American Arbitration Association shall be borne by RESPONDENT. Said fees and expenses shall be paid as directed by the Association.

6. The fees for remuneration of the Arbitrator shall be borne by RESPONDENT. Said fees shall be paid as directed by the Association.

7. This Award is in full settlement of all claims submitted to this Arbitration, except as provided in Paragraphs 1 & 2 of this Award.

/s/ Robert Bruce Shearer June 9, 1981
ROBERT BRUCE SHEARER, ESQ. (dated)

DATED:

STATE OF
) SS:
COUNTY OF

On this day of , 19 ,
before me personally came and appeared

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

_____

AMERICAN ARBITRATION ASSOCIATION

Construction Industry Arbitration Tribunal

In the Matter of the Arbitration between

HUGHES-BECHTOL, INC.
Dayton, Ohio
-and-
WEST VIRGINIA BOARD OF REGENTS
Charleston, West Virginia

CASE NUMBER: 52 110 0121-82 (Dated February 22, 1983)

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 5, 1979 and having been duly sworn and having duly heard the proofs and allegations of the Parties, finds as follows:

This cause having come before the Arbitrator on demand by Claimant, HUGHES-BECHTOL, INC., for determination of liability and the amount therefor, based upon the alleged breach of contract by the Board of Regents,

State of West Virginia. The Arbitrators find, based on the testimony and evidence presented at the hearing held at Dayton, Ohio on February 22, 1983 and taking into account the prior "AWARDS" involving the same contract and parties, pursuant to Rule 42 of the Rules of the American Arbitration Association, that the following award is fair and just.

THEREFORE, I AWARD AS FOLLOWS:

1. Claimant, HUGHES-BECHTOL, INC. shall not be liable for any damages, liquidated or otherwise because of late or delayed completion of the work requested under this contract.

2. Claimant, HUGHES-BECHTOL, INC. is entitled to be paid the sum of $398,685.85 for all claims for the performance of the contract herein involved based upon its performance period subsequent to 795 days (August, 1981). Such "AWARD" is in addition to the previous "AWARD" made by Arbitrator Shearer in AAA Case Number 52 10 0186-80, a copy of which is

attached.

3. The administrative fees and expenses of the American Arbitration Association shall be borne by RESPONDENT. Said fees and expenses shall be paid as directed by the Association.

4. The fees for remuneration of the Arbitrator shall be borne by RESPONDENT. Said fees shall be paid as directed by the Association.

5. This Award is in full settlement of all claims submitted to this Arbitration.

/s/ Wilbur S. Lang — February 22, 1983
WILBUR S. LANG, ESQ. (dated)

/s/ John W. Judge — 2/22/83
JOHN W. JUDGE (dated)

/s/ John C. Van Dyk — 2/22/83
JOHN C. VAN DYK (dated)

WEST VIRGINIA COURT OF CLAIMS

HUGHES-BECHTOL, INC.

VS.

BOARD OF REGENTS

(CC-81-450)

E. Glenn Robinson, Attorney at Law
and David L. Wyant, Attorney at Law
for claimant.

Victor A. Barone, Deputy Attorney
General and Henry C. Bias, Jr.,
Deputy Attorney General for respondent.

OPINION ISSUED JULY 26, 1982

RULEY, JUDGE:

This claim grows out of a written contract upon a printed form designated AIA Document A101, Owner-Contractor Agreement, incorporating AIA Document A201, General Conditions of the Contract for Construction, dated March 14, 1979, and duly executed by the claimant and respondent, respectively. The contract provides for the construction of a

Multi-Purpose Physical Education Facility at Marshall University, in Huntington, for a fixed sum of $3,162,173.00. The contract was approved by: the Director of the Purchasing Division; the Commissioner of the Department of Finance & Administration; and, finally, by the Attorney General on April 9, 1979. Paragraph 7.9.1 of the General Conditions, pertaining to Arbitration, provides:

> "All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof, * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. * * * The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Subsequently, a dispute arose between the parties based upon a claim by Hughes-Bechtol that the respondent, on the one hand, had caused substantial delay in performance of the contract and, on the other hand, had

refused to extend the time of performance. When amicable resolution of the dispute failed, Hughes-Bechtol filed a demand for arbitration at the Cincinnati Regional Office of the American Arbitration Association asserting a claim for damages in the sum of $932,172.00. On December 12, 1980, it was served upon the respondent. An arbitrator was duly appointed and, at a hearing on February 10, 1982, it was determined that the dispute was arbitrable. A hearing upon the merits of the dispute began on March 18 and continued on March 19, April 9 and May 29, 1981. On June 9, 1981, an award was made to Hughes-Bechtol in the sum of $521,326.48 to which fees of $7,884.63 were added, making a total of $542,982.11. That item is included in the present claim of $1,275,570.70 which also includes other disputes between the parties.

The matter now is before this court upon the claimant's motion for partial summary judgment enforcing the arbitration award. The

gist of the respondent's position in opposition to that motion is that the quoted arbitration provision of the contract is void and unenforceable because this court has exclusive jurisdiction of claims against state agencies such as the respondent and, for that reason, the respondent had no authority to agree to arbitration. The principal authority cited for that position is the case of J. L. Simmons Company, Inc., v. Capital Development Board, 424 N.E. 2d 821 (Ill. 1981), a very similar case in which enforcement of an arbitration award was denied because the Illinois Court of Claims has exclusive jurisdiction of the matter arbitrated. An examination of the Illinois Statute cited in that case, delineating the jurisdiction of its Court of Claims, Ill. Rev. Stat. 1979, Ch. 37, §439.8, and upon which the decision turned, however, discloses that it provides:

> "The court shall have exclusive jurisdiction to hear and determine the following matters:

* * *

(b) All claims against the State founded upon any contract entered into with the State of Illinois.

* * *"

In view of that statute, that decision could not have been otherwise. West Virginia has no similar statute.

West Virginia does have substantial statutory and case law on the subject of arbitration and, if nothing else is clear, it is certain that the policy of the law of this state favors arbitration. In Board of Education v. W. Harley Miller, Inc., _____ W.Va. _____, 236 S.E.2d 439, (1977) our Supreme Court of Appeals stated:

"* * * Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, arbitration is mandatory, and any causes of action under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award and the arbitration

> award is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award of the arbitrators upon motion for summary judgment made at the proper time.
>
> [4] The important words in the new rule are that the agreement to arbitrate must have been 'bargained for.' * * *"

If the agreement to arbitrate in this case was not "bargained for", in view of its various approvals, it would be difficult to conceive one that was.

In addition, West Virginia Code, §55-10-1, provides:

> "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submissions may be entered of record in any court. Upon proof of such agreement out of court, * * * it shall be entered in the proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement. * * *" (emphasis supplied)

The emphasized language "any court" plainly is broad enough to include this court and it is equally plain that the legislature could

have excluded this court from the operation of that statute had it wished to do so.

Finally, the general law appears to be to the effect that a state or its agencies may enter a valid contract with a private party providing for the arbitration of disputes that may arise under the contract. See 5 Am. Jur. 2d "Arbitration and Award" §67 and also 81A C. J. S. "Arbitration" §168c, page 636, where it is stated:

> "The parties to a contract for state improvements may agree to select an umpire or arbitrator to settle disputes as to the interpretation of the contract, and the rights of the parties thereunder, and his decision is binding in the absence of fraud or bad faith; * * *."

Since there is no assertion of fraud or bad faith in this case, this court is obliged to grant the pending motion and allow the award of $542,982.11. In addition, it appears proper to stay proceedings in this court as to the remaining matters in dispute pending their arbitration. See Zando, Martin &

Milstead, Inc. v. State Building Commission,

_____ Ct. Cl. _____ (1981).

Award of $542,982.11.

THE SENATE OF WEST VIRGINIA

SENATE FINANCE COMMITTEE

SUBCOMMITTEE ON CLAIMS

(Senators Spears, Cook and Kaufman)

January 21, 1983 - February 1, 1983

R E P O R T

Your Subcommittee on Claims has held a joint public hearing on several questioned claims with the House Finance Subcommittee on Claims, and has deliberated separately upon the claims contained in Senate Bill Nos. 198 and 199 (minutes attached).

This Report will contain the recommendations of your Subcommittee on both bills, and specific recommendations on several claims.

****

I SUBROGATION AND INTERAGENCY CLAIMS

A. The Subcommittee recommends that Senate Bill No. 198 be amended by

striking the following interagency claims:

1 - Page 2, line 27 (claim by DOH against Corrections)
2 - Page 3, line 25 (claim by WVU against Corrections)
3 - Page 4, line 2 (claim by DOH against Farm Management Commission).

B. The Subcommittee further recommends that Senate Bill No. 199 be amended by striking the following subrogation claims:

1 - Page 3, line 20 (Allstate Insurance claim against DOH)
2 - Page 4, lines 13 & 14 (Liberty Mutual Insurance claim against DOH)

II HUGHES-BECHTOL, INC. CLAIM AGAINST THE BOARD OF REGENTS

A. The Subcommittee recommends that Senate Bill No. 199 be amended by striking lines 17 & 18 on page 2.

B. The Subcommittee further recommends that the full Senate Finance

Committee adopt and communicate to the Court of Claims the position statement of the Subcommittee regarding this claim, as follows:

> The claim by Hughes-Bechtol against the Board of Regents (cc-81-450) is not found to be a moral obligation of the State at this time, due to the failure of the Court of Claims to hear the claim in accord with West Virginia Code §14-2-16, which requires that the Court "shall so conduct the hearing as to disclose all material facts and issues of liability.....". This action shall not prejudice the rights of the claimant to renew its claim, after which the Court of Claims shall conduct a full hearing on the merits of this claim.

III RECOMMENDATION FOR PASSAGE OF SENATE BILL NOS. 198 AND 199, AS AMENDED.

The Subcommittee recommends that Senate Bill Nos. 198 and 199 be amended by the full Committee on Finance as

recommended herein, and that the Committee on Finance report both bills to the Floor with a recommendation that they each do pass, as amended.

/S/ Senator Jae Spears, Chairperson

/S/ Senator Stephen Cook

/S/ Senator Tod Kaufman

SENATE FINANCE SUBCOMMITTEE ON CLAIMS

66TH LEGISLATURE

1ST REGULAR SESSION

Monday, January 31, 1983

The Senate Finance Committee's Subcommittee on Claims consisting of Senators Spears (chairperson), Cook and Kaufman, met with the House Finance Committee's Subcommittee on Claims consisting of Delegates Starcher (chairperson), Murensky and Faircloth, in a joint public hearing, at 9:00 A.M., Monday, January 31, 1983, in the Senate Finance Committee Room #455.

The Agenda (attached) included testimony by interested parties, and questions from members, relating to four major claims or groups of claims.

Speaking on the Hughes-Bechtol, Inc. claim against the Board of Regents were: Glen Robinson, representing claimant,

Victor Barone, representing the Attorney General, Dr. Grose, representing the Board of Regents, Arnold Margolin, representing Finance and Administration, and Cheryle Hall, representing the Court of Claims.

Reed Waters, attorney for DOH, answered questions by members concerning the Novo Corp. claim against that agency. Deputy Commissioner William Whyte, representing the Department of Corrections, responded to questions about various overexpenditures by the Department of Corrections. Secretary of State Manchin or a representative were unable to attend the hearing but did telephone afterward with comments on two questioned claims against his office. A letter has been delivered requesting his comments in writing (copy attached).

The hearing was adjourned by Senator Spears at 11:30 A.M.

/S/ Senator Jae Spears,
Chairperson
Subcommittee on Claims

/S/ John Pwibaugh
Counsel

SENATE FINANCE SUBCOMMITTEE ON CLAIMS

66TH LEGISLATURE

1ST REGULAR SESSION

Tuesday, February 1, 1983

The Subcommittee on Claims met at 8:30 A.M., Tuesday, February 1, 1983, in Senator Spears' office.

After discussion of the various claims, Senator Cook proposed a recommendation that Senate Bill No. 198 (by Mr. McGraw and Mr. Nelson - finding and declaring certain claims against the state and its agencies to be moral obligations and directing payment thereof (the overexpenditure claims)) be amended by striking all subrogation and interagency claims. The other members of the Subcommittee were in agreement.

After discussion of the various

claims contained in Senate Bill No. 199 (by Mr. McGraw and Mr. Nelson - finding and declaring certain claims against the state and its agencies to be moral obligations and directing payment thereof), Senator Cook proposed that all subrogation and interagency claims be struck. The other members of the Subcommittee were in agreement. Senator Cook then suggested striking the claim by Hughes-Bechtol, Inc. against the Board of Regents (page 2, lines 17 & 18) and communicating a legislative finding and declaration that said claim is not found to be a moral obligation of the state at this time, due to the failure of the Court of Claims to hear the claim in accord with West Virginia Code §14-2-16, which requires that the Court "shall so conduct the hearing as to

disclose all material facts and issues of liability.....", and further directing the Court of Claims to conduct a full hearing on the merits of this claim. This suggestion was adopted.

The Subcommittee adjourned, upon proper motions, at 9:10 A.M.

/S/ Senator Jae Spears,
Chairperson

/S/ John Pwibaugh
Counsel

D. COPY OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No.
C-3-81-38

HUGHES-BECHTOL, INC.	*	JUDGMENT
vs.	*	
WEST VIRGINIA BOARD OF REGENTS	*	(Filed December 4, 1981)
	*	

This action came on for ~~xxxxx~~ (hearing) before the Court, Honorable WALTER H. RICE, United States District Judge, presiding, and the issues having been duly ~~xxxxx~~ (heard) and a decision having been duly rendered, It is Ordered and Adjudged That Plaintiff's request for a preliminary injunction is OVERRULED, for lack of subject matter juris-

diction. Defendants Motion to Dismiss is SUSTAINED; Judgment to Defendant. Plaintiffs Motion to compel discovery and seeking statement of courts disinclination to sustain defendants motion to dismiss is Deemed Moot. Case Dismissed.

Dated at Dayton, Oh. , this 4th day of Dec. , 1981.

/s/ JOHN D. LYTER, CLERK
Clerk of Court

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 82-3217

HUGHES-BECHTOL, INC.,

v. Plaintiff-Appellant

WEST VIRGINIA BOARD OF REGENTS,

Defendant-Appellee.

Before: EDWARDS and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

J U D G M E N T

(Filed June 18, 1984)

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: July 10, 1984 A True Copy.

COSTS: None Attest:

Filing Fee.....$

/S/ Gary McCarthy
Gary McCarthy
Deputy Clerk

Printing.....$

Total.....$

E. OTHER APPENDED MATERIALS

CONSTRUCTION CONTRACT

THE AMERICAN INSTITUTE OF ARCHITECTS

Standard Form of Agreement Between
Owner and Contractor

where the basis of payment is a
Stipulated Sum
1977 Edition

This document has important legal consequences; consultation with an attorney is encouraged with respect to its completion or modification

Use only with the 1976 Edition of AIA Document A201, General Conditions of the Contract for Construction

This document has been approved and endorsed by The Associated General Contractors of America

---

AGREEMENT

made as of the Fourteenth day of March in the year of Nineteen Hundred and Seventy-Nine

BETWEEN the Owner:	WEST VIRGINIA BOARD OF REGENTS 950 Kanawha Bouldevard, East Charleston, WV
and the Contractor:	Hughes-Bechtol, Inc. P.O. Box 962 Dayton, OH 45401
The Project:	Multi-Purpose Physical Education Facility Marshall University Huntington, WV Project #2212
The Architect:	Bennett/Eggers - Architects A Joint Venture P.O. Box 1199 Morgantown, WV

The Owner and the Contractor agree as set forth below.

Copyright 1915, 1918, 1925, 1937, 1951, 1958, 1961, 1963, 1967, 1974, 1977 by the American

Institute of Architects, 1735 New York Avenue, N.W., Washington, D.C. 20006, Reproduction of the material herein or substantial quotation of its provisions without permission of the AIA violates the copyright laws of the United States and will be subject to legal prosecution.

AIA Document A101 Owner-Contractor Agreement Eleventh Edition June 1977 AIA 1977 The American Institute of Architects, 1735 New York Ave., N.W., Washington, D.C. 20006.

ARTICLE 1

THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, the Conditions of the Contract (General, Supplementary and other Conditions), the Drawings, the Specifications, all Addenda issued prior to and all Modifications issued after execution of this Agreement. These form

the Contract and are all as fully a part of the Contract as if attached to this Agreement or repeated herein. An enumeration of the Contract Documents Appears in Article 7.

ARTICLE 2

THE WORK

The Contractor shall perform all the Work required by the Contract Documents for (here insert the caption descriptive of the Work as used on other Contract Documents)

CONTRACT #2 - MECHANICAL WORK
MULTI-PURPOSE PHYSICAL EDUCATION
FACILITY HUNTINGTON, WV

ARTICLE 3

TIME OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

The Work to be performed under this Contract shall be commenced upon written "Notice to Proceed" from the owner and, subject to authorized adjustments, Substantial Completion shall be achieved no later than:

(Here insert any special provisions for liquidated damages relating to failure to complete on time)

(1) Seven Hundred (700) consecutive calendar days for Base Proposal work and
(2) One Hundred and Fifty (150) additional calendar days for work in existing building.

Contractor agrees to pay as liquidated damages the sum of Five Hundred ($500.00) Dollars per day for each consecutive calendar day of delay in completion of work beyond the date specified in the "Notice to Proceed" subject to allowances made for delays due to shortages of materials and/or energy resources, subject to proof by documentation, and also delays due to strikes or other delays beyond the control of the contractor, all reasons for delays documented and verified.

ARTICLE 4

CONTRACT SUM

The Owner shall pay the Contractor in current funds for the performance of the Work, subject to additions and deductions by Change Order as provided in the Contract Documents, the Contract Sum of Three Million, One Hundred Sixty-Two Thousand, One Hundred Seventy-Three Dollars ($3,162,173) The Contract Sum is determined as follows:

(State here the base bid or other lump sum amount, accepted alternates, and unit prices, as applicable.)

Accept the contractor's base proposal for Contract #2-Mechanical Work---$3,004,000

Alt.M-1. Gullickson Hall Renovations - Level A. + $76,724 NOT ACCEPTED

Alt.M-2. Gullickson Hall Renovations - Levels A&B-----ACCEPTED-----158,173

Alt.M-3. Elevator No. 1 No Bid NOT ACCEPTED

Alt.M-4. Air Conditioning for Multi-Purpose Activity Space + 259,474 NOT ACCEPTED

TOTAL CONTRACT PRICE-------$3,162,173

ARTICLE 5

PROGRESS PAYMENTS

Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided in the Contract Documents for the period ending the 25th day of the month as follows:

Not later than Thirty (30) days following the end of the period covered by the Application for Payment Ninety percent (90%) of the portion of the Contract Sum properly allocable to labor, materials and equipment incorporated in the Work and Ninety percent (90%) of the portion of the Contract Sum properly allocable to materials and equipment suitably stored at the site or at some other location agreed upon in writing for the period covered by the Application for Payment, less the aggregate of

previous payments made by the Owner; and upon Substantial Completion of the entire Work, a sum sufficient to increase the total payments to Ninety percent (90%) of the Contract Sum, less such amounts as the Architect shall determine for all incomplete Work and unsettled claims as provided in the Contract Documents.

(If not covered elsewhere in the Contract Documents, here insert any provision for limiting or reducing the amount retained after the Work reaches a certain stage of completion.)

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate entered below or in the absence thereof, at the legal rate prevailing at the place of the Project.

(Here insert any rate of interest agreed upon)

-0%-

(Usury Law and requirements under the federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal place of business, the location of the Project and elsewhere may affect the validity of this provision. Specific legal advise should be obtained with respect to deletion, modification, or other requirements such as written disclosures or waivers.)

ARTICLE 6

FINAL PAYMENT

Final payment, constituting the entire unpaid balance of the Contract Sum, shall be paid by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 Terms used in this Agreement which are defined in the Conditions of the Contract shall have the meanings designated in those Conditions.

7.2 The Contract Documents, which constitute the entire agreement between the Owner and the Contractor, are listed in Article 1, and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

(List below the Agreement, the Conditions of the Contract (General Supplementary, and other Conditions), the Drawings, the Specifications, and any Addenda and accepted alternates, showing page or sheet numbers in all cases and date, when applicable.)

Contractor's Form of Proposal dated March 1, 1979

Specifications entitled "Multi-Purpose Physical Education Facility", Marshall

University, Huntington, WV, Division 1, including Form of Advertisement, Instructions to Bidders, General Conditions and Supplementary General Conditions, Special Conditions, WV Dept. of Labor Wage Rates, Cash Allowances, Unit Costs and Alternates and Division 15, dated 1/22/79.

Drawings entitled "Multi-Purpose Physical Education Facility", Marshall University, Huntington, WV numbered P-600 thru P-613; P-602A; SU-1 and SU-2; H-700 thru H-719, H-703 A&B; H-707 A&B; H-711 A&B; H-717A; FP-900 thru FP-912, FP-902A & FP 906A, dated 1/22/79.

Addendum Bulletin #1 - dated 2/16/79

Addendum Bulletin #2 - dated 2/23/79

Addendum Bulletin #3 - dated 2/26/79

Addendum Bulletin #4 - dated 2/28/79

All the above listed specifications, drawings, addenda bulletins as prepared by Bennett/Eggers-Architects-A joint Venture of Robert J. Bennett, A.I.A. & Associates-Architects, P.O. Box 1199,

Morgantown, WV 26505 and The Eggers Group, 2 Park Ave., New York, NY 10016.

This Agreement Entered into as of the day and year first written above.

OWNER W. VA BOARD OF REGENTS

/S/ ILLEGIBLE
By

CONTRACTOR HUGHES BECHTOL, INC.
W. VA. Vendor #31-561-713-2

/S/ D. R. HUGHES, JR.
By
D. R. Hughes, Jr.
President

APPROVED

Pursuant to the provisions of Chapter 5A, the Official Code of West Virginia 1931, AS AMENDED STATE OF WEST VIRGINIA DEPARTMENT OF FINANCE & ADMINISTRATION

/S/ By WILLIAM K. BRENNER
MILES DEAN, Commissioner

APPROVED AS TO PROVISION AND TERMS

/S/ GLENN R. CUMMINGS
DIRECTOR, PURCHASING DIVISION

Approved as to form this 20 Day of April 1979
CHAUNCEY H. BROWNING, JR, ATTORNEY GENERAL
By NATHAN HARLAN
ASSISTANT ATTORNEY GENERAL

THE AMERICAN INSTITUTE OF ARCHITECTS

AIA Document A201

GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS MODIFICATION

1976 EDITION

TABLE OF ARTICLES

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This document has been approved and endorsed by The Associated General Contractors of America.

* * * * *

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 GOVERNING LAW

7.1.1 The Contract shall be governed by the law of the place where the Project is located.

7.2 SUCCESSORS AND ASSIGNS

7.2.1 The Owner and the Contractor each binds himself, his partners, successors, assigns and legal representatives to the other party hereto and to the partners, successors, assigns and legal representatives of such other party in respect to all covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder,

without the previous written consent of the Owner.

7.3 WRITTEN NOTICE

7.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or member of the firm or entity or to an officer of the corporation for whom it was intended, or if delivered at or sent by registered or certified mail to the last business address known to him who gives the notice.

7.4 CLAIMS FOR DAMAGES

7.4.1 Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the other party or of any of his employees, agents or others for whose acts he is legally liable, claim shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

7.5 PERFORMANCE BOND AND LABOR AND MATERIAL PAYMENT BOND

7.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering the faithful performance of the Contract and the payment of all obligations arising thereunder if and as required in the Bidding Documents or in the Contract Documents.

7.6 RIGHTS AND REMEDIES

7.6.1 The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.

7.6.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

7.7 TESTS

7.7.1 If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested or approved, the Contractor shall give the Architect timely notice of its readiness so the Architect may observe such inspection, testing or approval. The Contractor shall bear all costs of such inspections, tests or approvals conducted by public authorities. Unless otherwise provided, the Owner shall bear all costs of other inspections, tests or approvals.

7.7.2 If the Architect determines that any Work requires special inspection, testing or approval which Subparagraph 7.7.1 does not include, he will, upon written authorization from the Owner, instruct the Contractor to order such special inspection, testing or approval, and the contractor shall give notice as provided in Subparagraph 7.7.1. If such special inspection or testing reveals a

failure of the Work to comply with the requirements of the Contract Documents, the Contractor shall bear all costs thereof, including compensation for the Architect's additional services made necessary by such failure; otherwise the Owner shall bear such costs, and an appropriate Change Order shall be issued.

7.7.3 Required certificates of inspection, testing or approval shall be secured by the Contractor and promptly delivered by him to the Architect.

7.7.4 If the Architect is to observe the inspections, tests or approvals required by the Contract Documents, he will do so promptly and, where practicable, at the source of supply.

7.8 INTEREST

7.8.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the

absence thereof, at the legal rate prevailing at the place of the Project.

7.9 ARBITRATION

7.9.1 All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof, except as provided in Subparagraph 2.2.11 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.9.4 and 9.9.5, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. No arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, the Architect, his employees or consultants except by written consent containing a specific reference to the

Owner-Contractor Agreement and signed by the Architect, the Owner, the Contractor and any other person sought to be joined. No arbitration shall include by consolidation, joinder or in any other manner, parties other than the Owner, the Contractor and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration. No person other than the Owner or Contractor shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. The foregoing agreement to arbitrate and any other agreement to arbitrate with an additional person or persons duly consented to by the parties to the Owner-Contractor Agreement shall be

specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon in it accordance with applicable law in any court having jurisdiction thereof.

7.9.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Owner-Contractor Agreement and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits specified in Subparagraph 2.2.12 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.9.3 Unless otherwise agreed in writing, the Contractor shall carry on the Work and

maintain its progress during any arbitration proceedings, and the Owner shall continue to make payments to the Contractor in accordance with the Contract Documents.

ARTICLE 8

TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, the Contract Time is the period of time allotted in the Contract Documents for Substantial Completion of the Work as defined in Subparagraph 8.1.3, including authorized adjustments thereto.

8.1.2 The date of commencement of the Work is the date established in a notice to proceed. If there is no notice to proceed, it shall be the date of the Owner-Contractor Agreement or such other date as may be established therein.

8.1.3 The Date of Substantial Completion of the Work or designated portion thereof is the Date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents, so the Owner can occupy or utilize the Work or

designated portion thereof for the use for which it is intended.

8.1.4 The term day as used in the Contract Documents shall mean calendar day unless otherwise specifically designated.

8.2 PROGRESS AND COMPLETION

8.2.1 All time limits stated in the Contract Documents are of the essence of the Contract.

8.2.2 The Contractor shall begin the Work on the date of commencement as defined in Subparagraph 8.1.2. He shall carry the Work forward expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner or the Architect, or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in transportation, adverse weather conditions not

reasonably anticipatible, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by any other cause which the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Any claim for extension of time shall be made in wiring to the Architect not more than twenty days after the commencement of the delay; otherwise it shall be waived. In the case of a continuing delay only one claim is necessary. The Contractor shall provide an estimate of the probable effect of such delay on the progress of the Work.

8.3.3 If no agreement is made stating the dates upon which interpretations as provided in Subparagraph 2.2.8 shall be furnished, then no claim for delay shall be allowed on account of failure to furnish such interpretations until fifteen days after written request is

made for them, and not then unless such claim is reasonable.

8.3.4 This Paragraph 8.3 does not exclude the recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9

PAYMENTS AND COMPLETION

9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Owner-Contractor Agreement and, including authorized adjustments thereto, is the total amount payable by the Owner to the Contractor for the performance of the Work under the Contract Documents.

9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to the various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by

the Architect, shall be used only as a basis for the Contractor's Applications for Payment.

9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least ten days before the date for each progress payment established in the Owner-Contractor Agreement, the Contractor shall submit to the Architect an itemized Application for Payment, notarized if required, supported by such data substantiating the Contractor's right to payment as the Owner or the Architect may require, and reflecting retainage, if any, as provided elsewhere in the Contract Documents.

9.3.2 Unless otherwise provided in the Contract Documents, payments will be made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site and, if approved in advance by the Owner, payments may similarly be made for materials or equipment suitably stored at some other location agreed upon in writing. Payments for materials or equipment stored on or off the site shall be

conditioned upon submission by the Contractor of bills of sale or such other procedures satisfactory to the Owner to establish the Owner's title to such materials or equipment or otherwise protect the Owner's interest, including applicable insurance and transportation to the site for those materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work materials and equipment covered by an Application for Payment will pass to the Owner either by incorporation in the construction or upon the receipt of payment by the Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances hereinafter referred to in this Article 9 as "liens"; and that no Work, materials or equipment covered by an Application for Payment will have been acquired by the Contractor, or by any other person performing Work at the site or furnishing materials and equipment for the Project, subject to an agreement under which

an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor or such other person.

9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue a Certificate for Payment to the Owner, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor in writing his reasons for withholding a Certificate as provided in Subparagraph 9.6.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on his observations at the site as provided in Subparagraph 2.2.3 and the data comprising the Application for Payment, that the Work has progressed to the point indicated; that, to the best of his knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents

(subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to the results of any subsequent tests required by or performed under the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in his Certificate); and that the Contractor is entitled to payment in the amount certified. However, by issuing a Certificate for Payment, the Architect shall not thereby be deemed to represent that the has made exhaustive or continuous on-site inspections to check the quality or quantity of the Work or that he has reviewed the construction means, methods, techniques, sequences or procedures, or that he has made any examination to ascertain how or for what purpose the Contractor has used the moneys previously paid on account of the Contract Sum.

9.5 PROGRESS PAYMENTS

9.5.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents.

9.5.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's Work, the amount to which said Subcontractor is entitled, reflecting the percentage actually retained, if any, from payments to the Contractor on account of such Subcontractor's Work. The Contractor shall by an appropriate agreement with each Subcontractor, require each Subcontractor to make payments to his Sub-subcontractors in similar manner.

9.5.3 The Architect may, on request and at his discretion, furnish to any Subcontractor, if practicable, information regarding the percentages of completion or the amounts applied for by the Contractor and the action

taken thereon by the Architect on account of Work done by such Subcontractor.

9.5.4 Neither the Owner nor the Architect shall have any obligation to pay or to see to the payment of any moneys to any Subcontractor except as may otherwise be required by law.

9.5.5 No Certificate for a progress payment, nor any progress payment, nor any partial or entire use or occupancy of the Project by the Owner, shall constitute an acceptance of any Work not in accordance with the Contract Documents.

9.6 PAYMENTS WITHHELD

9.6.1 The Architect may decline to certify payment and may withhold his Certificate in whole or in part, to the extent necessary reasonably to protect the Owner, if in his opinion he is unable to make representations to the Owner as provided in Subparagraph 9.4.2. If the Architect is unable to make representations to the Owner as provided in Subparagraph 9.4.2. and to certify payment in the amount of the Application, he will notify

the Contractor as provided in Subparagraph 9.4.1. If the Contractor and the Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which he is able to make such representations to the Owner. The Architect may also decline to certify payment or, because of subsequently discovered evidence or subsequent observations, he may nullify the whole or any part of any Certificate for Payment previously issued, to such extent as may be necessary in his opinion to protect the Owner from loss because of:

.1 defective work not remedied,

.2 third party claims filed or reasonable evidence indicating probable filing of such claims,

.3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment.

.4 reasonable evidence that the Work cannot be completed for the unpaid

balance of the Contract Sum,

.5 damage to the Owner or another contractor,

.6 reasonable evidence that the Work will not be completed within the Contract Time, or,

.7 persistent failure to carry out the Work in accordance with the Contract Documents.

9.6.2 When the above grounds in Subparagraph 9.6.1 are removed, payment shall be made for amounts withheld because of them.

9.7 FAILURE OF PAYMENT

9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents any amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the

Owner and the Architect, stop the Work until payment of the amount owing has been received. The Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, which shall be effected by appropriate Change Order in accordance with Paragraph 12.3.

9.8 SUBSTANTIAL COMPLETION

9.8.1 When the Contractor considers that the Work, or a designated portion thereof which is acceptable to the Owner, is substantially complete as defined in Subparagraph 8.1.3, the Contractor shall prepare for submission to the Architect a list of items to be completed or corrected. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. When the Architect on the basis of an inspection determines that the Work or designated portion thereof is substantially complete, he will then prepare a Certificate of Substantial Completion which shall establish the Date of

Substantial Completion, shall state the responsibilities of the Owner and the Contractor for security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Contractor shall complete the items listed therein. Warranties required by the Contract Documents shall commence on the Date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate.

9.8.2 Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the Architect, the Owner shall make payment, reflecting adjustment in retainage, if any, for such Work or portion

thereof, as provided in the Contract Documents.

9.9 FINAL COMPLETION AND FINAL PAYMENT

9.9.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection, and, when he finds the Work acceptable under the Contract Documents and the Contract fully performed, he will promptly issue a final Certificate for Payment stating that to the best of his knowledge, information and belief, and on the basis of his observations and inspections, the Work has been completed in accordance with the terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor, and noted in said final Certificate, is due and payable. The Architect's final Certificate for Payment will constitute a further representation that the conditions precedent to the Contractor's being

entitled to final payment as set forth in Subparagraph 9.9.2 have been fulfilled.

9.9.2 Neither the final payment nor the remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or his property might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety, if any, to final payment and (3), if required by the Owner, other data establishing payment or satisfaction of all such obligations such as receipts, releases and waivers of liens arising out of the Contract, to the extent and in such form as may be designated by the Owner. If any Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify him against any such lien. If any such lien remains unsatisfied after all payments are

made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.9.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by the issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than the retainage stipulated in the Contract Documents, and if bonds have been furnished as provided in Paragraph 7.5, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to

certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.9.4 The making of final payment shall constitute a waiver of all claims by the Owner except those arising from:

.1 unsettled liens,

.2 faulty or defective Work appearing after Substantial Completion,

.3 failure of the Work to comply with the requirements of the Contract Documents, or

.4 terms of any special warranties required by the Contract Documents.

9.9.5 The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of the final Application for Payment.

OFFICIAL STATEMENT

In the opinion of Bond Counsel, interest on the 1977 Series A Bonds is exempt, under existing statutues and court decisions, from Federal income taxes. Under existing statutes the 1977 Series A Bond and the interest thereon are exempt from taxes directly imposed thereon by or under the authority of the State of West Virginia.

NEW ISSUE

$51,700,000

State of West Virginia

West Virginia Board of Regents

State System Tuition Fee Revenue Bonds,

1977 Series A

Dated: August 1, 1977 Due: April 1, as shown below

The 1977 Series A Bond will be issued in the form of coupon bonds, registrable as to principal only, in the denomination of $5,000. Principal and semi-annual interest (April 1 and October 1, first coupon April 1, 1978)

payable at the office of the Treasurer of the State of West Virginia, Charleston, West Virginia, or at the option of the holder at the principal office of Citibank, N.A., New York, New York or at the principal office of First National Bank of Chicago, Chicago, Illinois.

The 1977 Series A Bonds are revenue bonds of the State of West Virginia payable solely from the Revenues pledged therefor and defined herein. The 1977 Series A Bond shall not be deemed to be obligations or debts of the State of West Virginia and the credit or taxing power of the State of West Virginia shall not be pledged therefor.

$31,675,000 SERIAL BONDS

Amount	Due	Interest Rate	Price
$1,540,000	1979	3.40%	100%
1,515,000	1980	3.70	100
1,490,000	1981	4	100
1,475,000	1982	4.20	100
1,470,000	1983	4.40	100
1,490,000	1984	4½	100
1,505,000	1985	4.60	100
1,520,000	1986	4.70	100
1,540,000	1987	4.80	100
1,545,000	1988	4.90	100
1,565,000	1989	5	100
1,545,000	1990	5.15	100
1,625,000	1991	5.30	100
1,715,000	1992	5.40	100
1,810,000	1993	5½	100
1,910,000	1994	5.60	100
2,020,000	1995	5.70	100
2,135,000	1996	5 3/4	100
2,260,000	1997	5 3/4	100

$20,025,000 5.90% TERM BONDS due 2004
at 100% (Accrued interest to be added)

The 1977 Series A Bonds are redeemable prior to maturity as more fully described herein.

The 1977 Series A Bonds are offered when, as and if issued and received by the Underwriters subject to prior sale, withdrawal or modification of the offer without notice, and to the approval of legality by Hawkins, Delafield & Wood, New York, New York, Bond Counsel, and certain other conditions. Certain legal matters will be passed upon for the Underwriters by their counsel, Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia. It is expected that the 1977 Series A Bonds in definitive form will be available for delivery in New York, New York on or about August 30, 1977.

GOLDMAN, SACHS & CO.

YOUNG MOORE & COMPANY, INC.

SMITH BARNEY, HARRIS UPHAM & CO.
Incorporated

DEAN WITTER & CO.
Incorporated

July 26, 1977

No dealer, broker, salesman or other person has been authorized by the West Virginia Board of Regents or the Underwriters or the Financial Advisor to give any information or to make any representations, other than those contained in this Official Statement, and, if given or made, such other information or representations, must not be relied upon as having been authorized by any of the foregoing. This Official Statement does not constitute an offer to sell or the solicitation of an offer to buy nor shall there by any sale of the 1977 Series A Bonds by any person in any jurisdiction in which it is unlawful for such person to make such offer, solicitation or sale. The information set forth herein has been obtained from the West Virginia Board of Regents and from other sources which are believed to be reliable but it is not guaranteed as to accuracy or completeness, and is not to be construed as a representation by the Underwriters or the Financial Advisor. The

information and expressions of opinion herein are subject to change without notice and neither the delivery of this Official Statement nor any sale made hereunder shall, under any circumstances, create any implication that there has been no change in the affairs of said Board since the date hereof.

IN CONNECTION WITH THIS OFFERING, THE UNDERWRITERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICE OF THE 1977 SERIES A BONDS AT A LEVAL ABOVE THAT WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME

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WEST VIRGINIA BOARD OF REGENTS

Charleston, West Virginia

OFFICIAL STATEMENT

Relating to

$51,700,000

State of West Virginia

WEST VIRGINIA BOARD OF REGENTS

State System Tuition Fee Revenue Bonds,

1977 Series A

INTRODUCTION

This Official Statement of the West Virginia Board of Regents (the "Board"), including the cover page and appendices, is provided for the purpose of setting forth information concerning the Board; the Board's State System Tuition Fee Revenue Bond Resolution adopted July 26, 1977 (the "General Resolution") authorizing the issuance of its bonds; its $51,700,000 State System Tuition

Fee Revenue Bonds, 1977 Series A (the "1977 Series A Bonds"); and the Board's Series Resolution adopted July 26, 1977 (the "Series Resolution") authorizing the 1977 Series A Bonds. The General Resolution and the Series Resolution are sometimes collectively referred to herein as the "Resolutions" and the 1977 Series A Bonds and all other Bonds issued under the General Resolution are referred to herein as the "Bonds".

The 1977 Series A Bonds are issued under the provisions of the West Virginia Code of 1931, as amended, including particularly Chapter 18 thereof and Articles 12B, 24 and 26 of said Chapter (the "Act") and constitute the initial series of Bonds issued and secured under the Resolutions for the purpose of financing the costs of construction or acquisition of new buildings, the renovation or construction of additions to existing buildings, and the construction or acquisition of any other

capital improvements at State Institutions of Higher Education (the "Capital Improvements"). The 1977 Series A Bonds are being issued to provide monies which will finance Capital Improvements at State Institutions of Higher Education listed hereinafter and to provide for the payment of certain costs of issuing the 1977 Series A Bonds. Prior to or simultaneously with the issuance of the 1977 Series A Bonds, the Board will provide from other available funds for the payment when due of an aggregate principal amount of $9,005,000 West Virginia University Tuition Fees Refunding and Revenue Bonds, Series 1967 (the "1967 Bonds") which represents all of the outstanding bonds payable from tuition fees collected at West Virginia University. Upon making such provision for such payment the lien of the 1967 Bonds will be terminated, and the tuition fees collected at West Virginia University will be pledged to the payment of the principal of and interest on the Bonds. Additional series of

Bonds may be issued by the Board on a parity with the 1977 Series A Bonds, provided that each additional series will be authorized and secured by a series resolution adopted in accordance with and under the provisions of the General Resolution and the Act.

The Act created the Board on July 1, 1969, as the successor to the powers, duties and authority of the Board of Governors of West Virginia University and the West Virginia Board of Education, as such relate to higher education, and each valid agreement and obligation of the Board of Governors of West Virginia University and the West Virginia Board of Education as such relate to higher education became the agreement and obligation of the Board. The Board was created as an agency of the State and a corporation with the general determination, control, supervision and management of the financial business and educational policies and affairs of the State Institutions of Higher Education. The

State Institutions of Higher Education are comprised of sixteen institutions (consisting of two universities, two graduate colleges, eight four-year colleges, three community colleges and one two-year branch college) with a total present enrollment of approximately 70,500 students and employing nearly 10,300 faculty, administrative and service personnel. The institutions comprising the State Institutions of Higher Education are listed in Appendix A.

Pursuant to the Act, the Board is empowered to fix and collect tuition fees from students at the State Institutions of Higher Education. Tuition fees set forth in the Act are not less than $25 per semester for residents of the State and $175 for nonresidents, except at West Virginia University, where the minimum fees for residents and nonresidents shall be $40 and $205 per semester, or such greater amounts as may be authorized by the Board subject to the maximum limitations on tuition

fees and other charges contained in the Act. After July 1, 1977, all tuition fees collected under the Act from students at West Virginia University and Marshall University shall be paid directly into the State System Tuition Fee Special Capital Improvements Fund (the "Tuition Fund"). After July 1, 1978 all tuition fees collected under the Act from students at all other State Institutions of Higher Education, except the community colleges, shall be paid directly into the Tuition Fund and are pledged to the payment of the Bonds, all as more particularly provided for in the General Resolution and further described hereinafter. Tuition fees collected under the Act from students at the community colleges under certain circumstances shall be paid into the Tuition Fund and are pledged to the payment of the Bonds. The Board has covenanted not to pledge such tuition fees for any other obligation superior to or on a parity with the lien of the Bonds. The 1977 Series A Bonds, together

with all Bonds which may be issued hereafter under the General Resolution, are secured on a parity by the Revenues. The Board has covenanted in the General Resolution that no other bonds or other obligations superior to or on a parity with the lien of the Bonds other than with respect to a series of additional Bonds shall be issued and secured by the pledge of Revenues paid into the Tuition Fund.

The financial information and other data and tabulations with regard to the Board contained in this Official Statement and appendices hereto have been prepared by the Board from internal and third-party sources and have not been verified by independent public accountants.

[BALANCE OF OFFICIAL STATEMENT NOT PRINTED HERE]